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ABSTRACT

Presenting testimony on a joint resolution to extinguish any Mashpee Wampanoag right, title, or interest to certain lands in the Commonwealth of Massachusetts, these hearings include Senate Joint Resolution 86, the proposed bill, and statements by seven representative spokesmen. This action, as represented here, is premised on recognition that severe economic hardship for the residents of the town of Mashpee has resulted from the cloud on their titles following the initiation of a lawsuit by the plaintiff Mashpee Wampanoag Indian Tribe, since pursuant to the Indian Nonintercourse Act (the basis for this lawsuit) only an act of Congress can effect a clearing of title. The proposed bill presented in this document attempts to resolve the title problem by affecting an extinguishment by the United States to any right, title, or interest the plaintiff may have to the lands in question; however, it is noted that existing law now provides that should the plaintiff tribe prove a right to title, extinguishment by the United States would give rise to a claim against the United States for fair compensation under the fifth amendment of the Constitution. This document includes testimony presented by: a selectman from the town of Mashpee; a U.S. Senator from the State of Massachusetts; the Counsel for the town of Mashpee; the President of the Mashpee Indian Tribal Counsel; and the Counsel for the Mashpee Indians. (JC)

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MASHPEE LANDS

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HEARING

BEFORE THE

UNITED STATES SENATE
SELECT COMMITTEE ON INDIAN AFFAIRS

NINETY-FIFTH CONGRESS

FIRST SESSION

ON

S.J. RES. 86

TO EXTINGUISH ANY RIGHT, TITLE, OR INTEREST TO CERTAIN LANDS, IN THE COMMONWEALTH OF MASSACHUSETTS, AND FOR OTHER PURPOSES

OCTOBER 21, 1977

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION

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(II)

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MASHPEE LANDS

FRIDAY, OCTOBER 21, 1977

U.S. SENATE,
SELECT COMMITTEE ON INDIAN AFFAIRS,
Washington, D.C.

The committee met, pursuant to notice, at 10 a.m., in room 6202, Dirksen Senate Office Building, Senator James Abourezk (chairman of the committee) presiding.

Present: Senators Abourezk, Metzenbaum, and Hatfield.

Staff present: Alan R. Parker, chief counsel; Barbara Berger, staff attorney; Michael D. Cox, minority counsel; and Keith Kennedy. minority professional staff member.

Chairman ABOUREZK. The hearing will come to order.

The purpose of the hearing this morning before the Senate Select Committee on Indian Affairs is to take testimony regarding Senate Joint Resolution 86, a joint resolution to extinguish any right, title, or interest to certain lands in the Commonwealth of Massachusetts. This action is premised on recognition that severe economic hardship for the residents of the town of Mashpee has resulted from the cloud on their titles following the initiation of a lawsuit by the plaintiff Mashpee Wampanoag Indian Tribe now pending before the U.S. district court in Massachusetts.

The plaintiffs in this litigation have filed a motion with the court to amend their lawsuit to indicate that no relief is sought from any defendants respecting the right to possess any tract of land on which the dwelling of any defendant was located on the date of the commencement of the action.

However, this action by the plaintiff cannot clear title to the lands in question since, pursuant to the Indian Nonintercourse Act—the basis for this lawsuit—only any act of Congress can effect a clearing of the title. The resolution would seek to accomplish this by affecting an extinguishment by the United States to any right, title, or interest the plaintiff may have in the lands in question.

The sponsor of this bill, Senator Kennedy, has noted in his introductory statement that existing law now provides that should the plaintiff tribe prove a right to title, extinguishment by the United States would give rise to a claim against the United States for fair compensation under the fifth amendment of the Constitution.

This resolution in identical form was the subject of a hearing on October 13, before the House Subcommittee on Indian Affairs and Public Lands. At that hearing, representatives of the defendants and the plaintiffs both indicated support for this resolution, but the administration, through a representative of the Office of Management and Budget, strongly opposed the resolution. Essentially, their position

was that it would not be good Government policy to expose the United States to potential liability for a fifth amendment taking when the propery in question is presently valued at $150 million to $200 million.

In addition, during the House subcommittee hearing, substantial legal questions were raised as to whether this resolution, as drafted, could effectively clear title to the occupied lands in the claims area.

The significance of this bill, and of this hearing, is that this is the first opportunity the Congress has had to consider a legislative resolution to the eastern Indian land claims.

As chairman of this committee, I feel quite strongly that any legislative solution to these claims should be directed at achieving a workable resolution which is fair and just for all parties. For the Congress to legislate anything short of this would be less than responsible.

This hearing has been set to provide an opportunity for all concerned parties to express their views on these matters and to aid this committee in the performance of its task.

I now place in the record a copy of Senate Joint Resolution 86 and a draft of a bill proposed by Senators Kennedy and Brooke.

[The resolution and proposed bill referred to follow:]

95TH CONGRESS
1ST SESSION

S. J. RES. 86

IN THE SENATE OF THE UNITED STATES

OCTOBER 4 (legislative day, SEPTEMBER 22), 1977

Mr. KENNEDY (for himself and Mr. BROOKE) introduced the following joint resolution; which was read twice and referred to the Select Committee on Indian Affairs

JOINT RESOLUTION

To extinguish any right, title, or interest to certain lands in the Commonwealth of Massachusetts, and for other purposes.

Whereas the action entitled "Mashpee Tribe against New Seabury Corporation", pending before the United States District Court for the District of Massachusetts, has resulted in severe economic hardship for the residents of the town of Mashpee, Massachusetts, by clouding title to land in the town;

Whereas the plaintiff in such litigation has amended its suit to indicate that no relief is sought from any defendant respecting the right to possess any tract of land on which the dwelling of the defendant was located on the date of commencement of such action; and

II

Whereas only an Act of Congress can clear the title of the defendants to such lands: Now, therefore, be it

Resolved by the Senate and the House of Representatives of the United States of America in Congress assembled, That any right, title, or other interest based on section 2116 of the Revised Statutes (25 U.S.C. 177) of the plaintiff in an action entitled "Mashpee Tribe against New Seabury Corporation", filed in the United States District Court for the District of Massachusetts (Civil Action 76–3190–S), to the lands described in section 2 of this joint resolution is extinguished.

SEC. 2. The lands referred to in the first section of this joint resolution are the tracts of land which are the subject of the action referred to in such section and on which the dwelling of any individual was located on the date of commencement of such action: *Provided,* That if a single such tract exceeds one acre, the Secretary of the Interior, after consulting with the resident or residents of such tract, shall designate the portion of such tract, not to exceed one acre, which is reasonably necessary for the enjoyment of the dwelling and its accessory structures, and the portion of such land so designated by the Secretary shall be the land in such tract referred to in the first section of this joint resolution.

95th CONGRESS
1st SESSION

S. _____

(Here Fill in all that has except those provided for the date, number, and reference of bill)

IN THE SENATE OF THE UNITED STATES

Mr. Kennedy (on behalf of himself and Mr. Brooke)

introduced the following bill; which was read twice and referred to the Select Committee on Indian Affairs

A BILL

To settle certain Indian land claims in the Commonwealth of Massachusetts, and for other purposes.

(Insert title of bill here)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as "The Mashpee Indian Claims Settlement Act".

CONGRESSIONAL FINDINGS

SEC. 2. The Congress, after review of the Mashpee Indian land claim finds that:

(a) The action entitled "Mashpee Wampanoag Tribe against New Seabury Corporation, et al.," pending before the United States District Court for the District of Massachusetts, has resulted in severe economic hardship for the residents of the town of Mashpee, Massachusetts, by clouding title to land in the town; and that there is an immediate need for a fair and equitable settlement of such claims;

(b) The plaintiff [redacted] in such litigation has amended its suit to indicate that no relief is sought from any defendant respecting the right to possess any tract of land on which the dwelling of the defendant was located on the date of commencement of such action while reserving the right to raise other aspects of its claim which may lie under the law, or against

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3) Section 2116 of the Revised Statutes (25 U.S.C. § 177), known as the Indian Non-Intercourse Act, provides that "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution...";

4) In order to effectively clear the title of the defendants to such lands, the Congress must exercise its authority under Art. 1, Sec. 8, Cl. 3 of the United States Constitution regarding "relations with the Indian tribes," to convey or extinguish any right, title, or other interests, including any claims arising therefrom in such lands of any Indian nation or tribe of Indians or their successors in interests to any such rights.

DECLARATION OF POLICY

SEC. 3(a). The Congress hereby declares that it is the policy of this nation, as originally expressed in the United States Constitution (Art. 1, Sec. 8, Cl. 3) and again in the Indian Non-Intercourse Act (25 U.S.C. § 177), to retain exclusive responsibility and authority in the Federal Government for the administration of Indian land rights and resolution of any claims thereto.

(b) This federal responsibility, which has been interpreted to require legal representation of Indian rights as trustee and has formed the basis of the United States' authority to negotiate with Indian tribes or mediate between Indian and non-Indian parties, mandates that any legislative intervention directed at a resolution of any claims regarding such Indian rights, must be premised upon the voluntary participation of the Indian tribe or tribes.

DETERMINATION OF LANDS AFFECTED

SEC. 4(a). The lands to be affected by this settlement Act are those tracts of land not to exceed one acre which are the subject of the action referred to in SEC. 1 and on which the dwelling or private business of any individual was located on the date of the commencement of such action. The Secretary of Interior shall identify and publish a list of the tracts regarding which title will be cleared upon execution of the agreement authorized by SEC. 5 below, within thirty (30) days of the execution of said agreement.

(b) The Secretary may authorize the inclusion of tracts exceeding one acre if he determines, after consulting with the resident or residents of such tracts, that application of the one acre limitation will constitute a hardship for the individual taking into account local zoning ordinances or land use regulations or, is otherwise necessary for the enjoyment of the dwelling and its accessory structures, but in no event shall any additional lands be included for the purpose of future development of new residences or businesses. Any determination by the Secretary shall be subject to review in the District Court.

SETTLEMENT AGREEMENT

SEC. 5. Immediately upon enactment of this Act, the Secretary of Interior is hereby authorized and directed to offer to enter into an agreement with the Mashpee Tribe which will provide the following:

1) The Tribe shall be entitled to $4 million as complete compensation for the extinguishment by the United States of any right, title or interest, including any monetary damages relating to past or present trespass or rental values on the part of any Indian tribe to the lands described in section 4 above effective upon execution of the agreement by the Tribe and the waiver of their claim to the affected lands with prejudice in the present court action.

B) The Tribe's ultimate success on appeal on the issue of tribal existence should the District Court decide against the plaintiff tribe;

2) The Secretary of the Interior shall agree to establish and administer a fund based upon the Tribe's execution of this agreement and in accordance with the provisions of section 7 below;

3) Execution of this agreement shall constitute a waiver of the Tribe's claim to such lands with prejudice in the present court action or in any future court action, including any claim against the United States or the Commonwealth of Massachusetts, and shall also constitute a complete extinguishment of any interest as described in 1) above by the United States pursuant to the Indian Non-Intercourse Act.

PARTICIPATION OF COMMONWEALTH

SEC. 6. The Secretary of Interior is authorized to enter into negotiations with the Governor of the Commonwealth of Massachusetts regarding the Commonwealth's participation in this settlement.

DISTRIBUTION OF SETTLEMENT FUNDS

SEC. 7. Within 180 days following a determination of the Tribe's entitlement under section 5 above, the Secretary of the Interior and the Mashpee Wampanoag Indian Tribe shall jointly prepare and implement a plan for the use of such settlement funds. Such funds shall be exempt from any state or federal taxation and shall accrue interest pending implementation of such plan. The plan shall provide for the resolution of any questions of fact regarding which individuals shall be entitled to share in the fund or any assets or benefits derived therefrom. Any rights of any individual derived from the Wampanoag tribal claim to the lands affected by this Act shall be confined to the settlement funds authorized by this Act.

AUTHORIZATION OF FUNDS

SEC. 8. (a) There is hereby authorized to be appropriated $20 million for the purposes of section 5 of this Act.

(b) There is hereby authorized to be appropriated such sums as may be necessary for payment of interest in accordance with section 7.

SAVINGS CLAUSE

SEC. 9. To the extent that there may be any conflict identified between any provisions of this Act and any other federal laws applicable to the Mashpee Wampanoag Indian Tribe, the provisions of this Act shall govern.

SEPARABILITY

SEC. 10. If any provision of this Act or the applicability thereof is held invalid, the remainder of this Act shall not be affected thereby.

Chairman ABOUREZK. I would like to welcome to this committee Senators Ted Kennedy and Edward Brooke, who will be the first witnesses.

First of all, I would welcome the first witness, the Honorable Edward M. Kennedy, Senator from Massachusetts, who is interested in these matters.

I would like to open it up to you, Senator Kennedy.

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Thank you very much, Mr. Chairman.

I would like to file my prepared statement for the record, and then talk informally with you about our particular problem in Mashpee, and what I think is the most effective approach.

[The prepared statement of Senator Kennedy follows:]

STATEMENT OF SENATOR EDWARD M. KENNEDY
BEFORE THE SENATE SELECT COMMITTEE ON INDIANS
ON THE MASHPEE MASSACHUSETTS LAND DISPUTE

MR. CHAIRMAN, I WANT TO FIRST EXPRESS MY DEEP APPRECIATION TO YOU AND THE COMMITTEE FOR YOUR WILLINGNESS TO CONSIDER THE COMPLEX ISSUES SURROUNDING THE LAND DISPUTE IN MASHPEE, MASSACHUSETTS.

I KNOW ALL OF US ARE CONCERNED ABOUT THE ECONOMIC HARDSHIPS FACED BY LOCAL RESIDENTS BECAUSE OF THIS CLAIM. LITIGATION HAS BEEN PENDING IN THE UNITED STATES DISTRICT COURT IN MASSACHUSETTS FOR MORE THAN A YEAR NOW, AND THE TRIAL BEGAN ON MONDAY OF THIS WEEK. SINCE THE SUIT WAS FILED ON AUGUST 26, 1976, NO ONE HAS BEEN ABLE TO BUY OR SELL A HOME IN MASHPEE.

THE HUMAN TRAGEDY RESULTING FROM CLOUDED TITLE MUST BE OUR FOREMOST CONCERN. AN ELDERLY WOMAN FACED WITH INSTITUTIONALIZATION COULD NOT SELL HER HOME. THE PROBATION OF WILLS WHICH REQUIRE SALE OF REAL ESTATE CANNOT BE COMPLETED. A COUPLE TRANSFERED TO THE WEST COAST COULD NOT SELL THEIR HOME. EVEN RELATIVELY SMALL HOME REPAIRS CANNOT BE PERFORMED AS TITLES REMAIN CLOUDED. AND, JUST AS IMPORTANT, THE DISPUTE HAS CREATED BITTER DIVISIONS WITHIN THE TOWN.

OVER THE PAST YEAR, WE HAVE MADE REPEATED ATTEMPTS TO SETTLE THIS ISSUE OUT OF COURT. THE MASSACHUSETTS CONGRESSIONAL DELEGATION APPEALED TO PRESIDENT CARTER TO APPOINT A MEDIATOR. HE DID APPOINT JUDGE WILLIAM GUNTER, WHO SPENT A GREAT DEAL OF TIME WORKING WITH THE TWO PARTIES, BUT PREFERRED NOT TO

MAKE A RECOMMENDATION FOR SETTLEMENT UNTIL THE ISSUE OF TRIBAL IDENTITY IS DECIDED INCOURT.

LAST MONTH, WE MADE ONE LAST EFFORT TO SPUR NEGOTIATIONS BETWEEN THE PARTIES, AND THAT ALSO FAILED. DESPITE THE DELEGATION'S CONTINUED ENCOURAGEMENT FOR AN OUT OF COURT SETTLEMENT, NEGOTIATIONS HAVE CEASED, AND THIS MORNING MARKS THE END OF THE FIRST WEEK OF TRIAL.

WE ARE NOW FACED WITH THE PROSPECT OF YEARS OF PROTRACTED LITIGATION. IF AT LEAST A PARTIAL SETTLEMENT CANNOT BE REACHED SOON, THE FUTURE OF MASHPEE LOOKS BLEAK.

THESE EVENTS LED THE MASSACHUSETTS DELEGATION TO SEEK LEGISLATIVE SOLUTIONS. TWO WEEKS AGO, SENATOR BROOKE AND I INTRODUCED SENATE JOINT RESOLUTION 86, A RESOLUTION TO EXTINGUISH INDIAN TITLE, IF ANY, TO HOMEOWNED PROPERTY

IN MASHPEE. AN IDENTICAL BILL WAS INTRODUCED IN THE HOUSE OF REPRESENTATIVES BY CONGRESSMAN GERRY STUDDS. AT THAT TIME, WE CAUTIONED ALL PARTIES THAT WE DID NOT INTEND TO RAISE FALSE HOPES. WE WERE HEARTENED, HOWEVER, BY THE FACT THAT HEARINGS IN BOTH THE HOUSE AND THE SENATE WERE SCHEDULED QUICKLY.

AS YOU KNOW, THE HOUSE SUBCOMMITTEE ON INDIAN AFFAIRS AND PUBLIC LANDS HELD HEARINGS ON THE JOINT RESOLUTION LAST THURSDAY. TESTIMONY FROM ELIOTT CUTLER OF THE OFFICE OF MANAGEMENT AND BUDGET REVEALED THAT A SIGNIFICANT REDRAFT OF THE BILL WAS NECESSARY TO ADDRESS THE CONCERNS OF THE ADMINISTRATION. THEIR PRIMARY CONCERN, AS I UNDERSTAND IT, WAS THAT CONGRESSIONAL EXTINGUISHMENT

IN THE FORM OF SENATE JOINT RESOLUTION 86 WOULD OPEN THE UNITED STATES TO A POTENTIAL LIABILITY OF BETWEEN $150-200 MILLION DOLLARS IF THE INDIANS PROVED THAT THEY HAD RECOGNIZED TITLE TO THIS PROPERTY. THE ADMINISTRATION ALSO EXPRESSED CONCERN OVER THE PRECEDENT THIS MIGHT SET FOR OTHER INDIAN LAND CLAIMS. THEY FEARED THE PROSPECT OF FACING BILLIONS OF DOLLARS IN LIABILITY IF SIMILAR LEGISLATION WERE PASSED TO SETTLE OTHER INDIAN CLAIMS.

SINCE THE HOUSE HEARINGS LAST WEEK, WE HAVE HAD NUMEROUS DISCUSSIONS WITH THE WHITE HOUSE, THE INTERIOR DEPARTMENT, AND THE OFFICE OF MANAGEMENT AND BUDGET IN AN ATTEMPT TO DRAFT NEW LEGISLATION WHICH WOULD BE

SATISFACTORY TO ALL INVOLVED PARTIES. WE HAVE DISCUSSED A NUMBER OF OPTIONS WITH BOTH THE PLANTIFFS AND DEFENDANTS.

THE ADMINISTRATION SUGGESTED THAT NEW LEGISLATION COULD BE DRAFTED WHICH WOULD ESTABLISH A FUND ADMINISTERED BY THE INTERIOR DEPARTMENT TO BE AWARDED TO THE PLANTIFFS IF THEY ARE UTLIMATELY SUCCESSFUL IN DEMONSTRATING RECOGNIZED TITLE TO THE LANDS IN QUESTION. THE MAJOR ISSUE WAS OBVIOUSLY THE SIZE OF THE FUND. UNFORTUNATELY, WE FOUND NO AGREEMENT BETWEEN THE PARTIES ON HOW MUCH WAS FAIR.

IN FACT, WE HAVE BEEN UNABLE TO DEVELOP ANY SOLUTION WHICH IS COMPLETELY ACCEPTABLE TO ALL AFFECTED PARTIES.

MR. CHAIRMAN, IT WOULD BE APPROPRIATE AT THIS POINT

TO BRIEFLY REVIEW THESE LEGISLATIVE OPTIONS. ALL OF THEM ARE DESIGNED TO CLEAR TITLE TO HOMEOWNED PROPERTY.

FIRST, WE COULD CONTINUE WITH THE APPROACH TAKEN IN S.J. RES. 86 WHICH WOULD EXTINGUISH TITLE AND MAKE THE U.S. GOVERNMENT LIABLE FOR COMPENSATION IF THE PLANTIFF WINS ON THE QUESTION OF RECOGNIZED TITLE. THE BILL IS STRONGLY OPPOSED BY THE ADMINISTRATION, AND WOULD LIKELY BE VETOED IF PASSED BY CONGRESS. EVEN CONGRESSIONAL ENACTMENT IS HIGHLY DOUBTFUL, AS I UNDERSTAND THAT THE HOUSE SUBCOMMITTEE ON INDIAN AFFAIRS AND PUBLIC LANDS YESTERDAY REFUSED TO REPORT THE BILL TO FULL COMMITTEE.

SECOND, A FUND COULD BE ESTABLISHED, MANAGED BY THE SECRETARY OF INTERIOR, TO BE AWARDED TO THE INDIANS

UPON A FAVORABLE JUDICIAL RULING. HOWEVER, AS I MENTIONED EARLIER, THE PARTIES HAVE NOT BEEN ABLE TO AGREE ON THE SIZE OF THE FUND, NOR ON THE CRITERIA FOR RELEASE OF THE MONEY.

THIRD, WE COULD RECOMMEND AN IMMEDIATE CASH SETTLEMENT CONTINGENT UPON THE INDIANS WAIVING ALL CLAIMS TO HOME-OWNED PROPERTY IN MASHPEE. I UNDERSTAND THAT THE MASHPEE TRIBAL COUNCIL MAY ACCEPT $4 MILLION UNDER THESE CONDITIONS.

I KNOW THAT THE ADMINISTRATION MAY BE CONCERNED ABOUT THE POSSIBLE RAMIFICATIONS OF SUCH A SETTLEMENT. WOULD SUCH A POLICY ENCOURAGE FRIVOLOUS CLAIMS BY GROUPS PURPORTING TO BE INDIAN TRIBES? I DO NOT BELIEVE IT

WOULD. WITHOUT SPECIFICALLY ADDRESSING THE MERITS OF THE CASE, I FIND IT HARD TO BELIEVE THAT ANYONE COULD CALL THIS PARTICULAR MASHPEE SUIT FRIVOLOUS. IT HAS MANAGED TO REMAIN IN COURT FOR 13 MONTHS, CONTINUING TO CLOUD TITLE TO PROPERTY IN MASHPEE.

AFTER REVIEWING ALL AVAILABLE OPTIONS, IT APPEARS TO ME THAT AN IMMEDIATE SETTLEMENT IS MOST REASONABLE. IT WOULD LIMIT THE FEDERAL GOVERNMENT'S LIABILITY, AND PROVIDE AN EXPEDITIOUS METHOD OF CLEARING TITLE.

OF COURSE, SUCH A SETTLEMENT WOULD HAVE TO BE ACCEPTABLE TO BOTH THE INDIANS AND THE HOMEOWNERS. THE ATTORNEYS FOR BOTH PARTIES ARE HERE TO TESTIFY THIS MORNING. I HOPE THEY WILL COMMENT ON THESE OPTIONS,

PARTICULARLY THE IMMEDIATE CASH SETTLEMENT, OR ANY OTHER POSSIBLE SOLUTIONS THEY MAY WANT TO OFFER.

MR. CHAIRMAN, I LOOK FORWARD TO WORKING WITH YOU AND THE COMMITTEE TO EXPLORE LEGISLATIVE REMEDIES TO THIS MOST PRESSING PROBLEM. AGAIN, I APPRECIATE YOUR PROVIDING THIS FORUM TO CONSIDER THE COMPLEX ISSUES SURROUNDING THE MASHPEE LAND DISPUTE.

I HOPE THAT ALL THE AFFECTED PARTIES WILL MOVE QUICKLY TOWARD A FINAL RESOLUTION OF THIS SERIOUS MATTER.

THANK YOU.

Senator KENNEDY. Mr. Chairman, first of all, I want to extend my very warm sense of appreciation for your having this hearing. All of us who have followed Indian affairs in recent years, from the time the first Indian Subcommittee was established under Robert Kennedy have realized that particular committees of the Congress have often failed to provide an important forum for the airing and discussion of matters which affect our first citizens of this Nation. It was through your leadership that this committee was formed, providing for the development of expertise and knowledge to guide us in the Congress of the United States.

I want to join in expressing appreciation for the leadership you are providing in the areas of Indian affairs.

Mr. Chairman, we are facing a very difficult problem in Mashpee. We understand there are similar problems which exist in other areas. You are very familiar with them, particularly regarding the State of Maine as well as in other States.

In looking at how we might approach this particular issue, I think we have to consider what is happening to the people in Mashpee.

This morning, in one of our leading newspapers, we see the reports of unemployment in Mashpee of some 30 percent, one of the highest of any other community in our own State of Massachusetts, which perhaps has had more persistent unemployment than any other State in the country.

The numbers of people who have lost their jobs, who continue on unemployment, who have given up seeking employment is severe.

Second, there are a number of instances where elderly people, in fact all private homeowners have found it virtually impossible to sell their homes. Individuals have been transferred to different parts of either the State or country and cannot sell their homes. Cloud on the title has brought an enormous hardship to these powerless people in our society, particularly the elderly and a number of the poor people who live in that area and have inhabited that community over a period of many years.

They are the ones, as well as some of the smaller industries and perhaps some of the developers, who have really borne the brunt of this question of challenge and clouding of the title.

As we weave our way through different alternatives we should not lose track of the fact that there are people who want fairness and justice for the different parties who are the real recipients of the hardship in that community. They are the ones we are primarily concerned with and that is the reason we are trying to find some solution which would be agreeable to the two different parties. There are a number of different legislative approaches we must explore.

The legislation that Senator Brooke and I have filed with the Senate, which is before the committee, provides for the extinguishment of Indian title, if any, to home-owned property, which would permit the plaintiffs to sue the United States for just compensation if the Indians prove to have had recognized title.

In this particular area we have the Indians' support and homeowners' support. The estimated value of that particular property is anywhere from $150 to $200 million, the undeveloped land approximately $20 million.

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The Office of Management and Budget is strongly opposed to that particular provision. Considering the action taken by the House Indian Subcommittee, it is important to be fair to the people in Mashpee, and point out that the prospects for that particular approach are extremely limited.

It is important during these hearings that we not raise false hopes about any actions that can be taken by congressional committees. I can see, even though there may be support for that approach—and there is by me, Senator Brooke, and Congressman Studds—that there will be other members of the Senate, the Maine delegation, those from South Carolina, New York, and Rhode Island as well, who will say, "Well, you might be trying to look after the problem in Mashpee, but where does that leave us?"

I think it would be extremely difficult from a legislative point of view to expect that we could get the relief in that particular form. However, this is something which should be considered and we ought to have an opportunity to examine it.

The second approach was to establish a fund of approximately $20 million, which would go to the Indians if they win different phases of the litigation. The homeowners, as I understand it, basically support this particular provision. I will let those who speak for the Indian tribes express their own views.

The Office of Management and Budget has indicated that they would consider this concept, but I think the particular issues would be when that money would be released and under what circumstances, as well as the amount of the fund.

As I understand OMB's position, they would require that the Indian tribes be successful through substantial decisions of various courts. If that were the case, the plantiffs would likely say, "If we win our case all the way through the courts, then why shouldn't we receive the full value of the property in question?" That could be as much as $200 million.

OMB would likely reject this approach. Again, we fail to have agreement by all concerned parties.

A third approach would be a decision out of court. The figure which has been considered here would be $4 million, with participation by the Commonwealth of Massachusetts. State participation would have to be worked out with the Federal Government. I understand that Governor Dukakis and Lieutenant Governor O'Neill are trying to ferret out what would be a reasonable response.

Furthermore, it is my understanding that the plaintiffs would be positive in their response to this type of settlement. OMB has difficulty in supporting that particular proposal because of the precedent aspects of that proposal, although I think this particular issue is distinguishable from other cases around the country, and I think it is important that we hear this morning what the position of the landowners will be in Mashpee with regard to this proposal.

The question was posed in the House hearings last week, and I understand that Mr. St. Clair give a rather vague and general answer on it. It seems incomprehensible to me that those who would speak for the homeowners would say, "Well, because we have certain doubts as to the legitimacy of the Indian position, we are therefore going to

oppose any out-of-court settlement which would effectively clear title for the homeowners."

I know that they have expressed concern about it, but I think it is important that all the homeowners in Mashpee understand what the representation of their counsel would be on this particular issue.

Are they prepared to say they are refusing to support a proposal which would, if we were successful in appropriating approximately $4 million, resolve this issue in favor of the people in Mashpee because the spokesmen or representatives of the homeowners feel that that is going to be somewhat acquiescing in the position which has been taken by the Indian tribe? That would seem an intolerable situation to me. However, I think it is important to understand what the dichotomy is with regard to the various alternatives.

I must say that at this particular time we are going to continue to seek any potential legislative remedies. We obviously understand that it would be impossible for us to impose a legislative solution which was not going to be acceptable to the homeowners and the Indians, and which would be considered to be of such a nature as to establish an unfavorable precedent.

Mr. Chairman, I would hope we can get an agreement that this final alternative was a reasonable and rational way to proceed. We stand ready to work with this committee to try and deal with this particular problem.

We understand we would not have the support of OMB, but I am hopeful we would be able at least to answer their particular concerns in such a way as to satisfy members of the committee.

We are, finally, mindful that Senate Joint Resolution 86 would permit the suit to be brought against the Federal Government, but I think we have to be realistic about what the prospects of that would be both before the full committee and before the Senate. The people from Mashpee should understand that in spite of our efforts, and our commitment to try to move this whole process forward, that we are operating in a real world and with a situation which is extremely difficult with regard to persuading our colleagues of the viability of that particular approach.

I want to thank the chairman and Senator Metzenbaum for the opportunity to present these views and indicate I am very hopeful as a result of these hearings that we can settle on an approach which will provide relief and do justice and fairness to the parties who are interested.

Chairman ABOUREZK. Senator Kennedy, first of all, I want to say that I personally appreciate your meeting this issue and Senator Brooke meeting this issue head on. There are not many politicians willing to enter such a controversial area. You are both to be highly commended for it.

The second thing I would like to say is that with regard to these eastern land claims—and they all arise under the Nonintercourse Act of 1790—I proposed a solution to the President in June. I wrote him a letter at about the time Judge Gunter was coming back with his recommendation with regard to the Maine land claim, suggesting that an arbitration group be put together, possibly out of the American Arbitration Association, a totally neutral group experienced in this

kind of thing, who would examine all of the Nonintercourse Act claims, determining first of all their validity and trying to determine their value.

It is my belief, and I think I am supported in that belief by a number of experts, that responsibility is in the hands of the U.S. Government and not necessarily in the States, especially not in individual landowners, because we are talking about visiting the sins of our fathers on their children.

To this date I have not received a response from the President nor anybody else in the administration with regard to that proposal.

It seems to me that rather than having these things drag on through court, have title to individual landholdings clouded as they are in Massachusetts continuing to create political and economic uproar because of these claims, that it may be necessary now for Congress to take action along the same lines.

I think the President could have done it with a stroke of the pen. Because of his failure to do so, it may be necessary for us to act. As you know, it would be a lot slower and not as certain as having it done administratively.

I wonder whether I can first have your comment on that kind of a proposal.

I might add one more thing. The reason I think such an approach is necessary is that Congress, the country, Indian tribes, everybody would like to know at some point the status of these claims rather than having them in question and in doubt for an indefinite period of time into the future. It seems to me it is very necessary to do something like that in order to remove the great cloud over everything.

I would like your observation on those comments.

Senator KENNEDY. Mr. Chairman, it certainly seems desirable to attempt to mediate or arbitrate these particular issues.

Senator Brooke, Congressman Studds, and I initiated the idea of an independent mediator for Mashpee. We had asked our colleagues in the Maine delegation to join with us. They indicated that they principally wanted a factfinder, and really as an add-on to our own request the emergence of Judge Gunter developed.

Maine then was given priority. We were given assurances during that period of time that the interests of Mashpee were to be considered and reviewed, and then Judge Gunter made the recommendation with regard to Maine and did not do so with regard to Massachusetts and Mashpee.

We again tried to see whether we could interest the particular groups there in Mashpee in order to establish a mediator. We had in mind a very well-thought-of representative who has the confidence of the particular parties and is completely familiar with the problem there. That too, was rejected.

The concept of mediation in this area seems to me to be desirable. In terms of whether it is formulated in the way you have outlined here, I would like to give additional thought and see the exact parameters.

However, I think you are absolutely right in recognizing that the burden is falling on innocent people and it is intolerable to expect that this situation will continue for 5 to 8 years with all the human tragedy which would accompany it.

Obviously I would be glad to work with you on that particular proposal if we are unable to reach some other kind of legislative solution here.

Chairman ABOUREZK. Senator Brooke, do you have a statement?

Senator BROOKE. Yes; I do, Mr. Chairman.

STATEMENT OF HON. EDWARD W. BROOKE, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator BROOKE. Mr. Chairman, my colleague, Senator Kennedy, has eloquently described both the gratitude we feel for your committee's prompt action on our proposals and also our frustration over the intractable nature of the problems raised by the suit of the Mashpee Indians. We have worked unsuccessfully over more than a year to try to ease the burden on Mashpee residents, and it has become painfully clear to all that there is no simple general solution.

Certainly we do not expect the committee to be any more able to work magic than we have been. But we do hope that we can put before you the outlines of a revised proposal for a partial settlement which could work.

We have weighed not only the obvious benefits to the Indians and the non-Indian residents of Mashpee, but also the possible costs to the United States and to parties to other land claim disputes. And we have judged these costs to be truly minimal.

The United States would be, first of all, making a grant to free the homeowners of Mashpee who are trapped by this suit. Clearly, the United States is going to be the final guarantor of resolutions to the Indian land claims in the end anyhow, as you have suggested, Mr. Chairman. Here, it would also be gambling a small stake to avoid the risk of later being required to pay a far larger sum, should the tribe ultimately prevail.

Furthermore, this case, the only one to be brought to trial, is unique in several ways and thus will not be a model for settlement of somewhat similar disputes. The other eastern Indian land claims, potential or actual, have not entailed such suffering by entirely innocent parties. In no other case has the paralysis of the real estate market been so absolute. And pretrial rulings have sufficiently established the validity of the tribe's right to make a claim that our proposal would certainly provide no encouragement to those who might bring frivolous suits. The Mashpee tribal council may or may not have a valid claim, but it most certainly has a very serious suit.

I realize that members of this committee may quite naturally have hoped to see general solutions to all the eastern Indian land claims offered in the Congress. You have suggested one way you think this might be accomplished. The proposals we are working out not only offer little guidance to parties to other cases, but they also do not even constitute a general solution for Mashpee's problems.

Unfortunately, there can be no universal and just solution until the constitutional questions about the nature of these tribes' property rights are resolved. It has always been clear that we can only resolve those issues in Mashpee on which both sides can agree, because of the potential for new litigation in the event one side were not satisfied.

But I would like to reiterate that even a partial solution is absolutely essential to Mashpee. The worst hardship is being borne by a few persons, mostly older citizens, who for personal and health reasons must move and yet are caught in their unsold homes. The clear economic casualty of the Mashpee suit is the town's real estate market.

Mr. Chairman, I would like to offer for the committee's record a study done at my request by Mr. Robert Ropes, executive director of the Cape Cod Planning and Economic Development Committee. It shows the utter stagnation in a once-growing housing market. Between the lines of these abstract figures, one can see the very real families of seriously ill individuals who cannot move to the prescribed climate or the widow living in a large house she can no longer manage.

Senator Kennedy, Congressman Studds, and I have tried every possible avenue to a solution. Our attempts to get a negotiated settlement have failed.

Early this year I persuaded three title insurance companies to make admittedly conditional offers to extend coverage to properties in the town. But the lending institutions have, so far, not accepted the terms.

Two pieces of emergency legislation Senator Kennedy cosponsored with me and Congressman Studds introduced in the House have now become law. But they will only provide emergency help to previously viable small businesses and to howeowners recently unemployed because of the suit. Thus we must strike some bargain which can clear the homeowners' property titles.

Most of the residents of Mashpee share the disappointment of their congressional delegation that there seems to be no overall solution. No doubt, members of this committee would also like to find a way to end the unfair situation in which such landowners now find themselves, while still allowing the tribes to seek redress from the alleged injustice of the past.

Unfortunately, our laws provide no way for use to do so while protecting the rights of all citizens, Indians and non-Indians alike, to be secure in their property and secure in their access to our courts. Therefore, we are asking your committee to help us implement those limited solutions which the law does permit.

Mr. Chairman, I would like to reiterate for myself and for the people of Mashpee, as well as for Senator Kennedy and Congressman Studds, our deep thanks for the help and consideration your committee and its staff have sought to extend to this small town. You have demonstrated both the compassion and concern of the Senate and a sense of the ultimate responsibility the United States bears to resolve all the land claims brought under the 1790 act.

As the impossibility of an overall settlement is clear to us, my colleagues and I strongly feel we must try to take advantage of this one opportunity we do have. We still hope that, with your committee's continuing help, we can finalize a legislative package and see it enacted before it is too late.

I would like to comment upon the proposal you suggested.

As I said in my prepared text, I think perhaps a solution which would cover all eastern Indian land claims would not necessarily be of value to Mashpee because it is a unique case.

At trial now in the Federal district court in Massachusetts is the question as to whether the Mashpee tribe is a tribe qualified under the

act. That has to be determined. We have tried time after time to get the parties to negotiate, to give some relief to the homeowners who not only cannot sell their property but cannot even get loans to repair their property. The increasing costs and hardships in this town are severe.

I thought earlier, when I first went down to Mashpee and talked to the tribe and townspeople, that this is a case which should be negotiated, and brought to settlement before long and protracted trials, appeals to the circuit court of appeals, and possibly to the U.S. Supreme Court would take place. It has been very costly, I am sure, to the tribe. I am sure it has been very costly to the town.

I have considered legislation to reimburse them for counsel fees they have had to pay. This is just the beginning of these trials and we know of the tremendous cost of litigation today.

In the meantime those homeowners are still being subjected to great suffering.

When Judge Gunter was appointed we had hoped he would act as a mediator, but at no time did he really act as a mediator.

Chairman ABOUREZK. He acted more as an advocate than mediator, it seemed to me, in that Maine question.

Senator BROOKE. I speak only of the Mashpee case. He did not act as a mediator in that case. In fact, in meetings we had with the judge, he admitted he did not see his role as that of a mediator, so he never brought the parties together in the sense of trying to get them to resolve their differences. He merely listened to them. There were discussions but he never acted as a mediator, as you have stated.

We have been constantly pressed to file legislation and we realize that this kind of legislation will have difficulties.

We are here asking the Congress of the United States to at least give relief to these homeowners and make some settlement really out of court even though we recognize that this is a risk, but it is a risk which we feel should be taken. Certainly it is not wasted money when you consider the lives which are involved in the town of Mashpee. These problems are real. It could take literally years before this case would reach final determination under our judicial processes, as this committee well knows.

Therefore, we are very hopeful, Mr. Chairman and distinguished members of this committee, that you will look at this legislation with very deep and serious concern, and this is seriously filed with you because although we admit this is not an overall solution, of the solutions which have been recommended this is the best recommendation and proposal we can make to you at this time.

Again I want to thank you for holding these hearings and giving us this opportunity to be heard this morning to outline exactly what this legislation is about as well as the background of the Mashpee situation.

I would be pleased to answer any questions.

Chairman ABOUREZK. Senator Brooke, I want to say to you, as I did to Senator Kennedy, that you are to be complimented on your approach to this question. You have done it with fairness and passion typical of the approach you have taken on many issues.

In talking about that proposal of an overall settlement, it was not so much a question of lumping all the claims together but attacking

all the claims at the same time. I understand you have made clear that each claim is different and each circumstance is different, but I think what the Congress would like to know is what its total liability would be. That is one of the major purposes for the approach I have suggested. I think that would give us that sort of ball park figure regarding the total liability here.

One thing that I would like to state for myself is this: In all of these cases, and in cases out in the West as well, we are not talking about righting wrongs of the past so much as we are living up to our legal obligations.

The Indian tribes, both in the East and West, have begun to take their claims into court on many questions—water rights, land rights, and so on. They are finding there is a solid legal basis backing up the claims which they have.

It seems that in many cases, this is particularly true out West and not true in your case or some of the other eastern claims, the non-Indian people who seem to be affected by the Indian claims are saying: "Well, if the Indians are winning in court, we have to try to exercise our political strength and have Congress override the victories the Indians are winning in court."

That to me seems unfair. Your approach is fair because you do not seek to do that. You seek to alleviate the suffering and distress of the people in the area with which you are concerned, but yet you do not do it at the expense of the Indian tribes and their legal rights. That is what makes your proposal a very fair one.

I reiterate that the responsibility from the beginning has been with the U.S. Government and I think it should remain there. I don't think we can avoid that responsibility if we are to be a government considered to be a fair government.

I would like to express my thanks to you for your testimony and contribution you have made today.

Senator BROOKE. It is not our purpose to adjudicate the validity of the Indian claims. We don't know whether the Indians have a valid claim. We don't know that they don't have a valid claim.

We do know they have a right, a constitutional right, to pursue their claims in court as they are doing. On the other hand, we also know that these homeowners obviously deserve consideration for their homes and they are not responsible for the situation in which they find themselves, and so we have possible equities on both sides of this issue. Therefore, that makes it even more difficult to resolve. For that reason we cling to this solution which does not in any way extinguish the rights of the Indians to make their claims but at the same time gives relief to those homeowners who paid consideration for their property.

If in the event Indian claims are determined to be valid, then, of course, they would be compensated, as you said, by the Federal Government for those rights. This is what we are dealing with here, and I think it is good for the Congress to understand it.

When it first happened Congress laughed about the little town of Mashpee up there—my goodness, Indians are claiming all this land—and it was something of a joke. It is not a joke in Mashpee. It is a very serious problem for the people who live in that town. I am sure it is a very serious problem for the Indians as well. We must take it as a very serious problem and try to resolve it as a very serious problem.

As you said, if there is a wrong, then it is a wrong which had been committed by the Federal Government and not by the people of the town of Mashpee.

Chairman ABOUREZK. Senator Metzenbaum?

Senator METZENBAUM. I probably know less about the subject than anybody in the room, but I have a great deal of confidence in the concerns that you and Senator Kennedy have expressed over a period of many years about individual rights and people's rights.

As I see it, there may be a wrong here—at least an alleged wrong—and certainly a right to have some determination as to whether there was a wrong and, if so, whether there is a right.

Therefore, if there is a right, the issue becomes one of having a right without a remedy.

One possible remedy is that which is taking place in the courtroom today; that is, to make individual defendants bear the burden of a problem they obviously did not create.

It seems to me that better government has a responsibility.

There may be more than three alternatives, but at least I see three alternatives.

One is the alternative of making individual settlements, as the $4 million settlement would be, which probably does not resolve the issues but at least it addresses itself to the problems of the people of Mashpee and would be a settlement agreeable to the Indians.

That, as I understand it, the Federal Government says we don't want to do because it opens up the door to other similar kinds of settlements.

There may be some question as to whether $4 million is right or wrong or whether it should be $3 million or $5 million.

The other possibility, which apparently is provided for in the joint resolution, provides that the Federal Government—and I don't know whether that is a resolution or a legislative proposal, but one way or the other it comes out the same—extinguish the rights or accept the responsibility for all of the claims if they can be proven to be valid ones.

That seems to me to have much merit to it.

To say that the cost may be great, in my opinion, is a very inadequate kind of answer. Lots of things around here are prohibitively expensive unless you really want to do them; then if you really want to do them, the money is found or else the deficit becomes x billion dollars more.

Absent that—one of those two—I think the Federal Government has a responsibility to come up with its own affirmative answer as to how we deal with this problem of having a right without a remedy.

The only question I have of you—and maybe the question relates more directly to our next witness who is speaking for the Office of Management and Budget—is what proposal does the administration have if we don't go down either one of these two routes that I just mentioned.

It seems to me that we must come up with some answer, and we just can't turn our backs on these rights without at least applying an affirmative kind of answer.

If I have misstated the problem, I would appreciate it if you would clarify it for me.

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Senator BROOKE. Senator Metzenbaum, in the years I have known you, I have never known you to misstate a problem. You have targeted right in on the problem, and you have shown a grasp of the issues involved.

Obviously, I can't speak for the administration. I am probably less able to speak for the administration than anyone in the room, including my good friend, Senator Hatfield.

But as far as I know, the administration has no solution for this problem.

I am somewhat shocked and certainly disappointed that the President has not responded to Chairman Abourezk's request that the President consider the proposal that he made.

I remember calling the White House and telegram after telegram to try to get a mediator in this case. We had already asked for a mediator before. The mediator was brought in from Maine. Then we had to wait and wait and wait and continue to pressure the White House before we even got Judge Gunter to be assigned.

I don't charge the administration with insensitivity to it, but I think it is a problem of such a magnitude that the administration should have a solution to the problem or make a proposal—or at least react to proposals that have been made to the administration.

As I said before, I don't know whether these things are valid—I don't think any of us know at this time. It is a matter to be determined. I do know that we have to give some relief to the people of this town who are suffering and to this town that is dying. They just can't continue as they are at the present time.

They have limited industry—which, as I indicated, is dying. Building has come to a halt. There has been growing unrest in some businesses. It is a credit to both sides that this has not expanded more.

It is a very, very serious human problem. Some relief must be given to them.

If we wait for the judicial process to run its course, as I said, we could literally be waiting years. It is unfair for a government to allow this to happen.

I don't know what the tax rate will be in that city; I don't know what they are going to be able to do, but their services have been cut.

I am sure we have to get some relief to them.

If the administration does not come up with some proposal that is superior to this—and if they do, I will be very pleased to be the first to acknowledge it—I hope at least that they will support this recommendation which we are making to this committee.

Mr. Chairman, I have a report on construction in Barnstable County prepared by Cape Cod Planning and Economic Development Commission which I would like to have placed in the record.

Chairman ABOUREZK. Without objection, it is so ordered.

[The report referred to follows:]

CAPE COD PLANNING AND ECONOMIC DEVELOPMENT COMMISSION
1st DISTRICT COURT HOUSE, BARNSTABLE, MASSACHUSETTS 02630
TELEPHONE 617-362-3811

REPORT ON CONSTRUCTION IN BARNSTABLE COUNTY

Second Quarter (April - June) 1977

Construction activity in the second quarter of 1977 exceeded all single quarter building in the past four years, as more permits were issued than in any quarter since the second quarter of 1973. Total construction value was higher, and more housing units were approved at higher cost than in any quarter since the third quarter of 1973. Single-family housing construction dominated, with 800 permits (42.5% of all permits) representing $21,734,000 (67.2% of total construction value).

The half-year totals of all permits issued and overall value are also higher than they have been since 1973, despite the slow start of the first quarter of this year.

Total Permits, Cost and % Change

Quarter	Permits	% Change from Last Quarter	% Change from Last Year	Estimated Cost	% Change from Last Quarter	% Change from Last Year
1975-1st	690	- 50%	-	$10,661,000	- 49%	-
2nd	1,339	+ 94%	-	19,225,000	+ 80%	-
3rd	1,249	- 1%	-	14,149,000	- 26%	-
4th	1,201	- 4%	-	21,074,000	+ 49%	-
Total	4,479	-	-	65,109,000	-	-
1976-1st	1,047	- 13%	+ 52%	19,102,000	- 9%	+ 79%
2nd	1,522	+ 45%	+ 14%	31,485,000	+ 65%	+ 64%
3rd	1,398	- 8%	+ 12%	20,789,000	- 34%	+ 47%
4th	1,276	- 9%	+ 6%	24,491,000	+ 18%	+ 16%
Total	5,243	-	+ 17%	95,867,000	-	+ 47
1977-1st	1,049	- 18%	0	19,513,000	- 20%	+ 2%
2nd	1,884	+ 80%	+ 24%	32,354,000	+ 66%	+ 3%

While Barnstable remained in the lead with the highest construction value ($6,615,000), four towns showed total values more than double their first quarter levels: Provincetown at $1,734,000 (+ 347%), Falmouth at $5,526,000 (+ 186%), Bourne at $1,691,000 (+ 147%), and Yarmouth at $3,766,000 (+ 129%). In Provincetown, two municipal construction projects (nursing home and water storage tower) accounted for 90% of the total value. Falmouth's increase is attributable to a $1 million increase in housing units and $2 million gain in nonresidential additions and alterations due to an addition to Falmouth Hospital. Bourne's most significant expansion was in the housing category where the number of new units and their cost nearly doubled from the first quarter, amounting to 70% of the town's total second quarter construction value. In Yarmouth also, the number of new housing units and their cost more than doubled between quarters to account for 85% of its overall second quarter value.

Only four towns recorded lower construction values in the second quarter of 1977 than at the same time last year: Barnstable, whose 1976 total was inflated by the $9.4 million addition to Cape Cod Hospital, declined by $8 million; Mashpee and Wellfleet decreased by $440,000 and $345,000 respectively, due to reduced new home building; and Truro was down $132,000 because of lower-priced housing construction this year.

Housing Construction

As might be expected, the three most populous towns led in terms of new housing construction: 161 units in Falmouth, 160 in Barnstable, and 127 in Yarmouth, together accounting for 54% of the County total. Two towns - Dennis and Sandwich - approved another 20% of all new housing units in the County, 82 and 80 respectively. Single-family housing predominated, with only 29 units of multi-family housing approved, 27 in Falmouth and one duplex in Barnstable.

Only Mashpee and Wellfleet approved fewer new housing units in the second quarter than at the same time last year: Mashpee had 5 units this year compared with 27 last year, Wellfleet had 10 this year and 24 last year.

The greatest increases in housing units between the second quarters of 1976 and 1977 also occurred in the more populous towns of Falmouth (an increase of 59 units or 58%), Yarmouth (+ 54 units or 74%), and Barnstable (+ 45 units or 39%), as well as Sandwich with 40 additional units for a 100% increase.

New housing construction costs averaged $26,831 in the second quarter of 1977, an increase of less than 1% from the first quarter average of $26,675, and 1.5% from the $26,427 average of a year ago.

Housing Units Approved by Quarter

Quarter	Units	% Change from Last Quarter	% Change from Last Year	Estimated Cost	% Change from Last Quarter	% Change from Last Year
1975-1st	315	- 41%	-	$ 7,412,000	- 46%	-
2nd	410	+ 30%	-	9,650,000	+ 30%	-
3rd	394	- 4%	-	10,376,000	+ 8%	-
4th	528	+ 34%	-	13,216,000	+ 28%	-
Total	1,647	-	-	40,654,000	-	-
1976-1st	537	+ 2%	+ 70%	13,993,000	+ 5%	+ 89%
2nd	609	+ 13%	+ 49%	16,094,000	+ 15%	+ 67%
3rd	586	- 4%	+ 49%	15,529,000	- 4%	+ 50%
4th	563	- 4%	+ 7%	15,029,000	- 3%	+ 14%
Total	2,295	-	+ 39%	60,645,000	-	+ 49%
1977-1st	493	- 12%	- 8%	13,151,000	- 12%	- 6%
2nd	828	+ 68%	+ 36%	22,243,000	+ 69%	+ 38%

Residential Additions and Alterations

While there was no significant change in the number or value of residential additions and alterations between the second quarters of 1976 and 1977, permits increased 83% (from 371 to 679) and value increased only slightly (from $2,013,000 to $2,453,000) between first and second quarters this year, resulting in a decrease in average project cost from $5,426 to $3,613. This is further evidence of the second quarter emphasis on new home building over extensive residential remodeling.

Nonresidential Construction

While new nonresidential building increased substantially in terms of permits and, to a lesser extent, value from both the previous quarter and second quarter 1976 levels, the decline in average project cost suggests an aggregate of relatively smaller projects.

Nonresidential Permits, Cost and % Change

Quarter	Permits	2nd Quarter 1977 % Change	Estimated Cost	2nd Quarter 1977 % Change	Average Project Cost
2nd 1977	221	-	$ 4,161,000	-	$ 18,828
1st 1977	115	+ 92%	2,976,000	+ 40%	25,878
2nd 1976	85	+ 160%	3,035,000	+ 37%	35,706

The following major new nonresidential projects totaling $3,361,000, or 81% of all nonresidential value, were approved in the second quarter of 1977:

Provincetown	
Public medical institution	$ 1,015,000
Municipal water storage tower	542,892
Sandwich	
Supermarket	400,000
Stores	200,000
Yarmouth	
Fast-food franchise	160,000
Barnstable	
Restaurant	100,000
Centerville-Osterville Fire District water reservoir	486,650
Bourne	
Water storage reservoir	456,000

Nonresidential Additions and Alterations

At $3,497,000, the value of nonresidential additions and alterations represented just one-third of the second quarter value last year when the total was inflated by the $9.4 million Cape Cod Hospital addition. The average value per permit was $19,747 this year, compared with $63,796 last year.

Four major projects accounted for 83% of the total value in the

Latest quarter:

Barnstable	
Motel addition	$ 100,000
Store addition	500,000
Bank addition	110,000
Falmouth	
Falmouth Hospital addition	2,200,000

Realtors' Observations

Real estate activity was described as busy by an Upper Cape realtor who reported that houses, rather than land, were selling. Existing houses were in demand over new houses due to the amenities such as shrubbery and storm windows they offered, because lower taxes could be expected, and because chances of price negotiation were thought to be better. This realtor advised that now is the time to buy, as interest rates are already inching up, with an increase from 8-3/4% to 9-1/4% recently imposed by one bank.

A Mid-Cape realtor found the residential market steadily improving, with building permits up and more homes planned for fall and spring building. New homes priced in the mid-thirties to mid-forties range were selling quickly. A summer sales plateau was noted, but it was not viewed as unusual, as spring and fall are considered the peak sales seasons. Vacant land sales improved over the last quarter, with most interest in areas near population centers. Commercial property in the Hyannis area was said to be making a strong recovery, perhaps even exceeding residential activity. Although conceding that any change in Federal Reserve policy increasing interest rates could slow sales, this realtor expressed optimism for a good fall and continued high activity to next spring. Building costs will continue to escalate and could also affect sales, but these cost increases are considered unavoidable.

A Dennis-Yarmouth realtor reported more homes sold this year than in the past three years. Prices under $35,000 and between $45,000 and $55,000 were most in demand, while larger homes in the $90,000 to $110,000 category generated less activity. Financing is available at rates comparable to a year ago, 8-1/2% for a 50% mortgage and 8-3/4% for a 75% mortgage. Land sales are also increasing after a two-year slack, with lots of 20,000 square feet or less selling for $7,500 to $9,500 and $12,500 to $14,500, depending upon desirability.

A Lower Cape realtor characterized business as moderately good, but not excellent, with buyers selective and offers generally under the listed price. This realtor termed the predominantly custom-building Lower Cape market a buyer's market, with financing available but buyers wary of the direction of national policies. In the Lower Cape retired and second home market, there is no rush to buy. Multiple Listing Service (MLS) activity in the first half of the year was estimated to be comparable to last year in terms of gross sales, although sales last year were far ahead of the previous year.

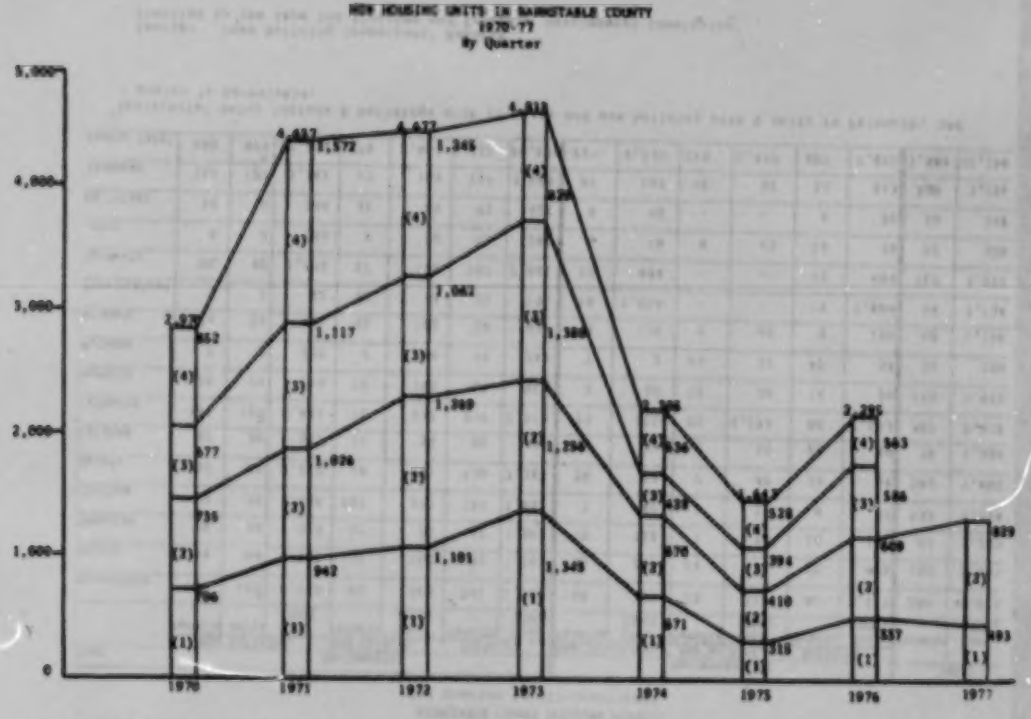
Another Lower Cape realtor found real estate activity encouraging thus far and is anticipating a fair fall. This realtor considers construction on the upswing, with more lots sold in the first half of this year than in all of last year. Beginning at $60,000 and up, houses were described as "high-priced, but moving."

BARNSTABLE COUNTY BUILDING PERMITS
2nd Quarter (April-June) 1977

Town	Residential							Nonresidential						Total	
	New Buildings			Add'ns/Alts.		Subtotal		New Structures		Add'ns/Alts.		Subtotal			
	Permits	Units	Cost (000)	Permits	Cost (000)	Permits	Cost (000)	Permits	Cost (000)	Permits	Cost (000)	Permits	Cost (000)	Permits	Cost (000)
Barnstable	159	168*	4,519	83	585	242	5,104	18	765	22	746	40	1,511	282	6,615
Bourne	44	44	1,183	39	100	83	1,283	49	294	24	114	73	408	156	1,691
Brewster	26	26	1,016	31	72	67	1,087	16	166	1	30	16	196	83	1,283
Chatham	32	32	1,486	101	371	133	1,857	1	40	3	17	4	57	137	1,914
Dennis	82	82	2,210	48	151	130	2,361	26	84	7	40	33	94	163	2,455
Eastham	37	37	927	17	54	49	981	16	34	10	15	26	49	75	1,030
Falmouth	141	161*	2,681	76	232	217	2,913	25	315	25	2,298	50	2,613	267	5,526
Harwich	25	25	758	76	193	101	951	2	50	12	36	14	96	115	1,047
Mashpee	6	6	205	7	44	12	249	1	2	46	37	47	39	59	288
Orleans	24	24	801	35	196	59	997	3	110	6	85	9	195	68	1,192
Provincetown	3	3	82	32	48	35	130	19	1,604	-	-	19	1,604	54	1,734
Sandwich	80	80	2,402	27	159	107	2,561	13	494	-	-	13	494	120	3,055
Truro	8	8	265	6	16	13	281	6	16	8	23	14	39	27	320
Wellfleet	10	10	344	32	84	42	428	6	20	-	-	6	20	48	448
Yarmouth	127	127	3,365	70	158	197	3,523	21	187	12	56	33	243	230	3,766
County Total	808	829	22,243	679	2,453	1,487	24,696	221	4,161	176	3,497	397	7,658	1,884	32,354

*Residential Units include 6 buildings with 22 units and one building with 8 units in Falmouth, and 1 duplex in Barnstable.

Source: Town Building Inspectors' Reports
Compiled by the Cape Cod Planning and Economic Development Commission



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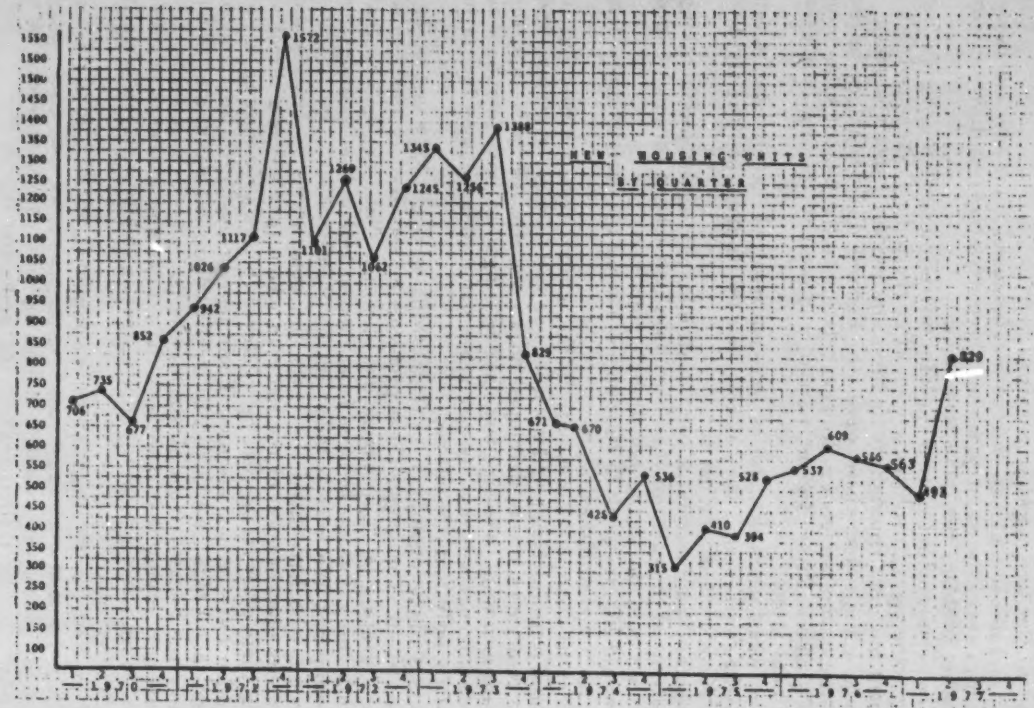

Compiled by Cape Cod Planning and Economic Development Commission from Town Building Inspectors' Reports

Senator HATFIELD. Mr. Chairman, I want to welcome my very good friend to the hearing this morning.

I would like to make an observation, because I think that out in the Western part of the country, we have been wrestling in a different way with this problem for quite some time.

It concerns me that neither the administration nor the Congress has really come up with solutions, even after the judicial branch of Government has gone through its findings and rendered its decisions.

Some 4 years ago, there were two Federal district judges in the Northwest who rendered a decision relating to the take of salmon on the Columbia River. In our part of the country, fishing is a very emotional issue.

That was 4 years ago, and we have not resolved that problem—even after the courts found very clearly that the Indians had the right to take 50 percent of the catch.

You can imagine what a very small minority of the people taking 50 percent of the catch of the Columbia River salmon because of aged treaties would do to the non-Indian population.

I would like to speak to the subject beyond the economic problem that we are dealing with.

What has happened. not only in the natural resource field but in the land consolidation problems where we still have reservations—and those reservations were developed on a checkerboard basis—and the Indians now want to consolidate those holdings—we have found a very significant backlash that by any other name comes out as racism in all of its ugly manisfestations.

This is a noneconomic factor that I think we ought to be just as concerned about. The longer these problems go unsolved or unattended we are creating an environment out of which that bugaboo and that horrible thing that has beset us from time to time in this Nation—racism—appears. We have it today in the Northwest.

People who have lived for years and generations as friends and neighbors now, because of the red man whom they see as a threat to either their property or fish, or whatever the resource may be, all of a sudden have become enemies. Their fear brings forth this kind of racism that I think we should be deeply concerned about, and which I know the Senator from Massachusetts is.

I am only saying that if we took the gamble and settled this matter out of court, it seems to me the administration should see this as a really viable alternative.

If we wait for the litigation to be completed, we still do not necessarily find a solution because that litigation, as I say, occurred 4 years ago in my country and we still haven't solved the problem—even after two courts rendered their verdicts on the fishing rights.

So I want to commend the Senator for his sensitivity and his concern and deep compassion that he has not only for those who are landholders but those who have the claims—our American Indians.

Thank you, Senator Brooke, for your appearance here this morning.

Senator BROOKE. I thank my dear colleague.

I would just like to say that what he described as a problem in his section of the country—the great State of Oregon—already exists in the small town of Mashpee.

It was, and it is, a very wonderful cape town. "They are very warm and beautiful people, but racism has crept into this town as a result of this.

Racism has also had an economic impact in that there has been an economic retaliation in certain instances on both sides as a result of these claims. So we are seeing it.

As I said earlier, I think it is to the credit of both sides that it hasn't expanded more than it has so far.

That is why, when I first went down to the town—there was a very big meeting in the town of its citizens to address it—you could sense it as you walked into the room.

Being a lawyer and former attorney general myself, in looking at this case I said it is a case that should be settled and not adjudicated.

Most of our efforts have been in that direction, because property rights are important but human rights are still more important.

We have to save the town and the property rights, and even the Indians understand this. They have amended their claim, so far as occupying land is concerned. They are not giving up their rights, but they have amended their claim so far as occupying is concerned, realizing that this town can never exist if the land is taken from those people who once paid consideration for it.

As long as we deny the people who have that right and bought that land the right to sell that land and repair that land—or do anything with it—the business of racism will do nothing but increase and fester.

It is a problem.

I am certainly not surprised that my distinguished colleague recognizes that this is more than an economic problem, but it is also a very deep and emotional human problem.

I thank my colleagues.

Chairman ABOUREZK. Thank you, Senator Brooke. We appreciate your appearance.

Our next witness is Eliot R. Cutler, Associate Director for Natural Resources, Office of Management and Budget.

STATEMENT OF ELIOT R. CUTLER, ASSOCIATE DIRECTOR FOR NATURAL RESOURCES, ENERGY, AND SCIENCE, OFFICE OF MANAGEMENT AND BUDGET

Mr. CUTLER. I appreciate the opportunity to appear before you today to testify on the Mashpee Wampanoag Indian claims issue.

The Executive Office of the President—and Office of Management and Budget in particular—is deeply involved in several unique Indian claims cases, including the Mashpee case.

The bill before the committee and a similar measure in the House, House Joint Resolution 612, are intended to relieve homeowners in the town of Mashpee, Mass., from the severe hardship caused by the pendency of an Indian land claim to much of the town.

The claim is being asserted by the Mashpee Wampanoag Indians, and it has clouded the titles to all real estate within the town.

All proposals under discussion this morning, including the one I will advance on behalf of the administration, have one common element. They would have the effect of extinguishing, through direct ex-

tinguishment or ratification, any right, title, or other interest to certain lands within the town of Mashpee arising under the Indian Nonintercourse Act of 1790 and asserted by the plaintiff in an action entitled *Mashpee Tribe* v. *New Seabury Corporation*, on file with the U.S. district court of the district of Massachusetts.

The lands which would be affected are those tracts on which the dwelling of any individual, or in some cases the dwelling of private business, was located on the date of the commencement of the lawsuit. However, if such a tract exceeds 1 acre, the Secretary of the Interior can designate a portion of that tract which is reasonably necessary to be withdrawn from the Indian claim.

The administration is sensitive to the difficulties caused by the recent assertion of Indian land claims in many parts of the United States. We generally have supported the concept of fair legislative resolutions of legitimate claims to prevent endless litigation which causes economic stagnation and hardship and bitterness to and among the innocent people in communities affected by such claims. However, the administration does not support the enactment of the bill introduced in the House or similar measures before this committe.

Before discussing our concerns with these bills and before describing the approach we would suggest, I would like to point out, first—and this is really a formal but necessary statement—that nothing in my testimony today should be taken as this administration's acknowledgment of the tribal status of the Mashpee Indian claimants. That is an issue which is central to the land claim itself and on which we are not this morning taking a position.

Also, our concerns regarding this proposed resolution of the Mashpee claim should be viewed in the context of eastern Indian land-claims generally.

Claims of varying sizes have been asserted in Maine, Massachusetts, Connecticut, Rhode Island, New York, South Carolina, and Louisiana.

We are opposed to legislation, such as the House bill and similar measures, which would set a precedent by, first, shifting the risk solely to the Federal Government and, second, exposing the Federal Treasury to potential staggering liability for those claims.

Certainly the Federal Government has a role to play in the resolution of these issues. However, States and perhaps others in many cases should share as well—an option practically foreclosed by the House legislation and by Senate Joint Resolution 86 as presently drafted.

In his report on the Passamaquoddy and Penobscot Indian claims in Maine, Judge Gunter, the President's representative, proposed that $25 million be appropriated by Congress toward settlement of those claims. The administration has not made a final decision on the formula for the settlement of the Maine claims.

However, we recognize that there may very well need to be some contribution to the settlement by the State of Maine as well as by the U.S. Government.

Before we can endorse a legislative resolution of any Indian claims, we need to know what both the immediate fiscal consequences and the overall fiscal implications by precedent will be.

In the case of most of the Mashpee proposals, we cannot adequately foresee those consequences.

These proposals would create substantial Federal responsibility where none previously has existed and will be the predicate and model for demands that the Federal Government assume similar responsibility in the many other Indian land claims pending throughout the country.

Any attempt to address the problems created by the Mashpee claims, without simultaneously giving full consideration to the other claims and to the need for reassessment of those claims, would be unfair to the other Indian tribe claimants, to the individual defendants in the other affected communities, and to the people of the United States as a whole.

Chairman ABOUREZK. Mr. Cutler, do I understand OMB's position is that all these claims should be attacked at the same time?

Mr. CUTLER. It is the administration's position that, at least with respect to any legislative solution of the type that has been introduced in the House and now in the Senate, all of the claims should be carefully considered together.

Chairman ABOUREZK. Are you able to explain why the administration hasn't reacted to the proposal I have made which is exactly that?

Mr. CUTLER. Speaking only for myself and not for those in the administration, I had not seen the letter which you referred to earlier. But I now have a copy of it and I can assure you that you will get a quick response. I apologize for the delay.

The House bill and many of the other proposals do not provide for any "settlement" of the Mashpee Indian claim. They merely would extinguish a "portion" of the claim.

Enactment of the House bill would provide the plaintiff in the Mashpee Tribe lawsuit with the opportunity to sue the United States in court of claims for a taking of property claimed to be its own.

If the plaintiff has a valid claim and if its claim is one for recognized title as opposed to one based on mere aboriginal use and occupancy, it would be entitled to just compensation under the fifth amendment to the U.S. Constitution.

Thus, if the Indian claimants have a valid private property right to the lands they claim, this bill is an exercise of Congress's eminent domain power.

The United States has not been a party to the litigation, and we are unable to determine whether the claim is a valid one. We must oppose bills, therefore, which would expose the Federal Government to open-ended liability in the court of claims. We cannot assess the risk that liability will attach or the potential amount of the liability.

The Federal Government may also have several choices as to how the problems created by the pendency of the Indian claims most appropriately should be resolved. Those choices can have a dramatic impact on the cost of a Federal solution.

For example, the House legislation, as proposed, seeks to extinguish the Mashpee claims rather than to ratify the conveyances whereby the individuals who allegedly were members of the Mashpee Tribe sold their land to third parties. To choose extinguishment rather than ratification could have the following consequences:

First, the plaintiffs, should they prevail with respect to the merits of their claim and then proceed against the United States in the court of claims for damages, undoubtedly would contend that the extin-

guishment constituted a "taking" as of the date when the legislation was enacted and would seek to measure their damage according to the current fair market value of the property affected by the extinguishment.

Applied to the other Indian claims pending throughout the Eastern United States, such a measure of damages could conceivably result in a total liability exposure to the United States in the hundreds of billions of dollars.

Second, extinguishment precludes any congressional consideration of the fairness of the transactions wherein the planitiff's alleged predecessors in title conveyed their land to the defendant's predecessors.

Suppose, for example, that after appropriate investigation, Congress were to find that all the Indians who transferred their land in Mashpee between 1859 and today had received full value in compensation.

Federal taxpayers might appropriately ask whether any damages should be paid by Congress under these circumstances. A technical violation of the Nonintercourse Act might have been proven. However, no real damage would have been suffered as a consequence.

Under such circumstances, Congress may have the legal power, if not obligation, simply to ratify the original transaction as of the date when the conveyance took place and thus completely clear title without incurring any substantial Federal liability.

Alternatively, if a specific conveyance was found to have been for less than the fair market value of the property at the time in question, Congress might have the power to decide to appropriate for the injured parties the difference between the fair market value of the property at that time and the amount actually received by the plaintiff's predecessor in title, if any, plus interest if and where appropriate.

A similar compensation approach was used by the Indian Claims Commission for many years. This approach would provide redress for the plaintiffs but at a cost to the Federal Government considerably below the extinguishment measure of damages arguably created by the proposed legislation.

Third, the extinguishment legislation does not attempt to preserve for the United States' benefit those defenses, setoffs, and counterclaims now available to the private property owners whose title presumably would be cleared.

Accordingly, the United States could find itself considerably more defenseless and more exposed to a substantial damage claim than the private property owners benefited by this legislation.

Fourth, and finally, because of the plaintiff's claims in the Mashpee litigation are apparently based on "recognized" rather than "aboriginal" title, ratification would appear the more appropriate remedial device. We know of no instance when Congress has extinguished recognized title. Extinguishment is a device normally employed with respect to aboriginal title only.

The administration is concerned about the impact of the pending legislation on the lives of the people of Mashpee.

We stand ready to discuss possible approaches to settlement with the parties to the case and the State of Massachusetts.

I, personally, in the last 10 days, have had many discussions and spent many hours on this with the members of the Massachusetts delegation and the staff.

The administration cannot at this time, however, support any legislation which would provide substantial settlement payments to the plaintiffs in the Mashpee Indian claims litigation.

Without regard to the strength or weakness of the particular claims in that case, such a settlement at this stage of the litigation would encourage frivolous claims and would subject the Federal Government to unreasonable economic demands.

In this regard, it should be noted that even the most frivolous of claims can create continuing economic chaos and hardship in a given community by, for example, clouding title.

To provide substantial settlements in any case merely because such hardship has been created on the grounds that a lawsuit has been brought would improperly reward such frivolous lawsuits.

By contrast, in the Maine Indian land claims case, the litigation has progressed considerably further, and significant legal decisions have already been made.

While either side might prevail in Maine, it is clear at this juncture that the Indians' claims cannot be termed "frivolous."

Accordingly, the administration has found it appropriate to consider settlement terms in that case.

With respect to the Mashpee litigation, the administration would be willing to support legislation framed in accord with the following requirements:

First, the Federal Government will contribute $3 million, contingent on the Commonwealth of Massachusetts' contribution of $1 million, thereby providing a total fund of $4 million.

Second, the Mashpee plaintiffs will agree to the entry of an order dismissing with prejudice all claims against all persons or entities owning developed property within the claims area up to and including 1 acre per property owner.

Third, Congress will ratify those transactions whereby the predecessors in title to the owners of such developed property acquired the property from the plaintiff's alleged predecessors in title.

Fourth, if the plaintiffs prevail in the Mashpee litigation and prove: (a) that they are a tribe as required by the provisions of the Indian Nonintercourse Act, (b) that they own recognized title to the properties claimed but not cleared pursuant to paragraph 3 above, and (c) that they lost said properties as a consequence of actionable violations of the Nonintercourse Act; then in lieu of any recovery from the owners of the developed property described in paragraph 3 above, and also in lieu of any recovery from the United States, the Commonwealth of Massachusetts, or any other entity, the plaintiffs shall receive the entire fund created by the legislation—the sum of $4 million.

The Federal Government's legitimate interest in protecting itself from frivolous litigation would be served by such contingency payment legislation. At the same time, the proposed statute would protect the tribe from the possibility that Congress would ratify all of

the transactions involved in this case at any stage of the proceedings and would find that the tribes had received fair compensation in those transactions, and would award no damages whatsoever, even assuming that the plaintiffs were able to prove themselves a recognized tribe previously owning recognized title.

I think that is a risk which does exist without suggesting at all that the Congress ought to, or would, take those steps.

If the plaintiffs have been candid in their assertion that they have no intention of taking homes away from anyone, the $4 million should be acceptable compensation for the leverage they would be surrendering pursuant to the legislation.

I want to clarify this point.

The plaintiffs would remain in court against the owners of the undeveloped land, that is, land on which homes do not exist and businesses do not exist.

Title would be clear to the homes and businesses of the people of Mashpee.

The administration would hope that that would bring substantial relief to the people who are indeed suffering dire and undue hardship.

Chairman ABOUREZK. If a claim is frivolous, and I think we all have to be concerned about that, and if the United States didn't extinguish the claim but transferred it from the homeowners to the U.S. Government, by definition the U.S. Government would have no liability for the frivolous claim.

It is merely the act of disproving the frivolous claim by the U.S. Government instead of the homeowners; isn't that correct?

Mr. CUTLER. Let me make sure I understand your question.

If you are suggesting that if the United States stepped into the shoes of the individual defendants in this case and the United States itself defended the claim, then I would assume that if the case went to litigation and if it were a frivolous claim, there would ultimately be no liability on the part of the United States.

Chairman ABOUREZK. Second, then, if the claim is not frivolous——

Let me back up. Are you saying at this point that you don't know if the Mashpee claim is frivolous or not?

Mr. CUTLER. Yes.

Chairman ABOUREZK. Then in any lawsuit in settlement negotiations, before trial and before a decision has been finalized, wouldn't this be just like any other lawsuit—if you pay your money and take your chances or you don't pay your money and take a greater chance?

Mr. CUTLER. It would depend on the posture of the settlement of the parties.

I think you have just put your finger on what we see as a basic distinction between the proposals we have made and the proposals that have been advanced on Senate Joint Resolution 86 and others.

To the extent that we can be assured that there will be some proof of the merits of the claim, we are prepared to put into a fund, which could be paid contingent on that proof, sums of money which would relieve the owners of the property in question from any hardship now or in the future.

Our concern, however, is that if payment is made either immediately, or not contingent on establishing such proof, we would be encouraging the kinds of frivolous actions which may or may not be obtained in

Mashpee right now but which could, as you would agree, obtain throughout the Eastern United States.

Chairman ABOUREZK. Let's return to the question of who should be liable for a claim.

I understand in the Kennedy-Brooke legislation there is a $4 million payment for extinguishment of the small claims.

Mr. CUTLER. I am not sure which legislation you are addressing. I have seen not only Senate Joint Resolution 86, but I have also seen a draft that is a substantial revision of that bill.

Chairman ABOUREZK. Let's talk about the proposed bill that we are dealing with.

Mr. CUTLER. Let me refresh my memory. Is that a $4 million payment?

Chairman ABOUREZK. Yes.

I will just read from section 5 of that bill.

> Immediately upon enactment of this Act, the Secretary of Interior is hereby authorized and directed to offer and to enter into an agreement with the Mashpee Tribe which would provide the following:
>
> (1) The Tribe shall be entitled to $4 million as complete compensation for the extinguishment by the United States of any right, title, or interest, including monetary damages relating to past or present trespass or rental values on the part of any Indian tribe to the lands described in section 4 above.

Those are 1-acre tracts—anything up to 1 acre. Effective upon the execution of the agreement by the tribe.

That execution of the agreement constitutes a waiver of the tribe's claim to such lands with prejudice in any court action, present or future.

Now that is the offer in this particular piece of proposed legislation.

Would the administration agree or object to a modification of the proposed legislation just simply transferring the claim from the homeowner over to the U.S. Government. Then if it is a frivolous claim, you have nothing to worry about.

Mr. CUTLER. Mr. Chairman, could you give me just a moment to look at this? This is a new draft, and I would like to read it briefly.

Chairman ABOUREZK. Surely.

[Pause.]

Mr. CUTLER. Let me be sure I understand this proposed legislation.

This would amount to a $4 million payment to the Mashpee Wampanoag Tribe without any contingent requirement that there be a showing either of its existence as a tribe or its merits as a claim.

We have taken the position that we would be opposed to that kind of a settlement on the grounds that it in itself would encourage frivolous actions to be brought.

I think your suggested modification of it, whereby the United States would take up the claim on behalf of the defendants, would not—and I am making a tentative statement here—materially change that concern.

Chairman ABOUREZK. Which concern?

Mr. CUTLER. The concern that we would be inviting frivolous claims.

Let me explain why I am suggesting that.

Yes; it would relieve the individual homeowners of the present economic hardships. It would, however, involve the United States in litigation directly. It would require them to defend these claims.

In that sense it seems to me it would probably invite many more claims against the United States than might otherwise be brought.

It would involve many more defenses of those claims than the United States is otherwise likely to have to undertake.

Let me reserve, if I may, making a final statement. I think it is something you can take into consideration; but the question which I have just raised is one which I think we woud have with respect to the kind of modification which you have suggested.

Chairman ABOUREZK. It appears to me that the choice that you are faced with is this:

You can go along and maintain as your policy the idea that you don't want to get the United States involved in any of these claims and let the homeowners fight it out, or you can take the homeowners off the hook.

That is the choice that the administration is going to have to make.

Mr. CUTLER. I think we have made what we consider to be, given what the plaintiffs have said in this case, an offer which would provide the plaintiffs with essentially guaranteed payments if they can show that their claims are not frivolous. Our offer would also have the result of taking the individual homeowners and business owners off the hook.

I believe it is the plaintiff's position that that is not adequate.

They have said that they do not want to take the homes of the people of Mashpee.

They have already filed a motion to amend their complaint.

As I understand it, they have not agreed to dismiss all of that portion of the complaint with prejudice, which I think you would agree is essential. But if indeed they mean what they say about not wanting to take the homes or businesses of the individual defendants, then even if the Federal Government did not enter into this case right now to relieve those individual defendants of the burden and if the plaintiffs were to succeed, it is unclear to us how $4 million would be paid over to the plaintiffs without a substantial impact on the homes and businesses of those individual defendants whom the plaintiffs claim will not be affected.

Senator METZENBAUM. Would you say that again?

Mr. CUTLER. To my knowledge, the plaintiffs have made the statement that they do not want to take the homes and businesses of the people of Mashpee. We accept that at face value.

If that is true, in our view, they should be willing to accept a guaranteed $4 million payment in lieu of those homes and businesses which they suggest they do not want, contingent on showing that their claim has merit.

Even if we do not enter into any relief, once they make their showings and if the litigation proceeds all the way through, I fail to understand what damages they intend to recover if they do not intend to cause hardship to the owners of those homes and businesses.

Chairman ABOUREZK. You are overlooking the trespass claims which have nothing to do with the ejectment from the property.

Mr. CUTLER. But if the owners of those homes and businesses are liable for $4 million, I would suggest it is going to be difficult for them

to come up with a payment of those damages without having some effect on the homes and businesses.

Chairman ABOUREZK. That is a different question—how much they are going to come up with.

You are talking about what the plaintiffs themselves would be giving up. And they are giving up a trespass claim.

I am just filling in what you left out.

Mr. CUTLER. I agree with you, that they will be giving up a trespass claim. I would add that I fail to see how the damages for that claim could be provided in any sum near $4 million without having a substantial impact on the owners of those homes or businesses.

Chairman ABOUREZK. As I say, that is a separate problem.

Let me try to summarize and see if I understand your position.

You will put up a $3 million fund if the State will put up $1 million—for a total of $4 million.

Mr. CUTLER. I need not add that the money saved and the sums mentioned there are the more negotiable aspects of our proposal.

The principal of participation by the State of Massachusetts is important. The dollar amount of that participation is less important.

Chairman ABOUREZK. Second, whatever amount of money that you agree upon then, the plaintiffs must agree to the entry of an order dismissing with prejudice all claims for up to 1 acre of ground.

Third, if Congress ratifies these transactions, in effect you are saying that you are ratifying the 1790 Nonintercourse Act. Is that right?

Mr. CUTLER. What the Congress is doing is ratifying the transactions which took place allegedly in violation of the act.

Chairman ABOUREZK. Then the fourth point you have is that if the plaintiffs prevail in litigation—in other words, with the settlement fund in place—they still have to go through court.

Mr. CUTLER. Yes, sir.

Against the owners of the undeveloped lands, which are substantial, they would not be relieved under this proposal.

The claims do not differ as between the owners of the homes and businesses and the present owners of undeveloped land.

The showings that will have to be made by plaintiffs to preserve claims with either group of defendants are the same.

Chairman ABOUREZK. The tribe can decide what they want to do with that.

Mr. CUTLER. Counsel to the tribe I understand is here.

Chairman ABOUREZK. Yes; and we will ask him about that.

Senator METZENBAUM. I would like to ask you some questions, because I have a little difficulty understanding the administration's position.

I commend you for the fact that you at least come forward with a proposal which is something different than that which often occurs.

Chairman ABOUREZK. I had never seen an OMB witness before a congressional hearing—before Bert Lance and Mr. Cutler. They are the only two people from OMB that I have ever seen.

Mr. CUTLER. This is not my first appearance, but it is the first time I have had the pleasure of being here.

Chairman ABOUREZK. When did that practice start, by the way? You guys used to hide out and send somebody else.

Mr. CUTLER. I still do except on Thursday and Friday. [Laughter.]

There are two reasons why I am here today, and I suppose it should be in the record because it is true that OMB has not made this a practice.

The first reason is that the Department of the Interior presently has pending before it by the Wampanoag Indians a claim for Federal recognition. Therefore, we did not believe, and the Department agreed, that it would be proper for them to appear here.

Second, the claims made in Mashpee are rather supergenerous. The President has taken a personal interest in them.

Judge Gunter has participated in discussions with parties in both cases. We, at OMB, as part of the President's staff, participated substantially.

So the Mashpee claims are being treated, at least at the present time, as something important in nature.

Senator METZENBAUM. If the Indians were to prevail in their litigation—I think it is a claim for $200 million—do you have any idea what the actual——

Mr. CUTLER. I am not sure a dollar amount has been stated for the claim.

It is a claim for the land in question, the present fair market value of which is estimated to be between $100 and $200 million as far as developed property is concerned.

Senator METZENBAUM. My question is: If they prevail, why should they take $4 million for a claim that is worth $100 million to $200 million?

Mr. CUTLER. I think that goes to the point, Senator, that I was discussing with the chairman.

Let me go through it again.

Senator METZENBAUM. I think I understand. You are saying that they will be assured that they are going to get the $4 million.

Mr. CUTLER. Not only that, but we are taking at face value representations which the Indians have made in this case that they affirmatively do not want to displace the owners of those homes and businesses and do not want to affect them or cause them hardship.

Once we take that statement at face value, it is difficult for us to understand how they could recover anywhere near $4 million from those people without having the kinds of impacts that they have asserted they do not intend to have.

Senator METZENBAUM. Mr. Cutler, if you were their lawyer, wouldn't you have advised them that that was a tactic that they had to take because otherwise sociologically jurisprudence would work so badly against them that they wouldn't have a chance of winning their case? Wouldn't you have advised them to that effect?

Mr. CUTLER. As an attorney, Senator, I have always made it a practice not to advise hypothetical clients. [Laughter.]

Senator METZENBAUM. I didn't ask you to have a hypothetical client.

The fact is that tactically it was necessary to make that kind of a statement. As I understand it, they haven't given up their legal rights have they?

Mr. CUTLER. No, sir. What they have done, and I think in support of what they have said—and I would not want to take what they have

said at anything less than face value—is filed a motion to amend their original complaint which would dismiss those claims against the class of property owners whom they are discussing.

They have, however, not agreed at this time—and I gather this is the basic bone of contention—to dismiss those claims with prejudice.

They would be free, even if their motion to amend this complaint were granted, to bring an action.

Seantor METZENBAUM. You are saying that if they win a lawsuit that is worth somewhere between $100 million and $200 million and if they prove three items you mentioned, then the Federal Government—which at that point has a moral obligation for the full extent of their claim—should pay them $4 million. Is that a fair restatement?

Mr. CUTLER. Yes.

To make it more complete, they would, I assume, recover either land or dollars from the owners of the undeveloped land.

Senator METZENBAUM. That is my next question. Why do you want to separate that, and why do you want to have that case proceed forward; because the hardship and the problem for the owners of the undeveloped land may be equally as serious as it is for the owners of the less than 1 acre plots.

Just because you own 30 acres in this area, there is no reason you are a superwealthy human being and therefore don't worry about a $200 million lawsuit.

Mr. CUTLER. We have been concerned with this question, Senator.

The position that we have taken, in that respect, has only really been in response to the proposals which have been advanced by the members of the delegation. I would not want to preclude a more total arrangement from consideration.

Senator METZENBAUM. As a member of this committee, I would say if I were to approve anything, I would want to approve a total solution of this matter and not a partial solution and leave some people hanging out there to defend that case.

Mr. CUTLER. I understand.

Senator METZENBAUM. Coming back to the settlement, would the Government be willing to eliminate the requirement that the plaintiffs prevail in the Mashpee litigation, provided that the plaintiffs would still be required to prove points a, b, and c?

Mr. CUTLER. No, sir.

Senator METZENBAUM. Then isn't the Government taking a position that is almost incredulous? To ask somebody to win their lawsuit and then to be entitled to receive anywhere from 25 to 50 times the amount of the total settlement, and the Government to then say will pay $3 million.

Mr. CUTLER. I do not think it is incredulous.

First of all, as I said before, we are taking what they have said at face value. We are taking them at their word.

Senator METZENBAUM. What do you mean "at their word"?

Mr. CUTLER. When they say that they do not seek to displace or adversely affect the position of the owners of the homes and businesses of the town of Mashpee, we take them at face value. We understand that to mean that if they won their lawsuit, they would not take any steps which would have those effects.

We do not understand how they can recover $4 million or more without having that effect.

Senator METZENBAUM. It certainly would have greater strength in making their claim to Congress for the entire amount if they had a judgment for $100 million.

Mr. CUTLER. I would not suggest that that would not be an alternative open to them.

Let me suggest—and I think I am now breaking my own rule and advising a hypothetical client—that the other side of the coin that the plaintiffs would have to take into consideration is that in the future the Congress might decide, given a set of circumstances that they might obtain, that they—the Congress—would just ratify the transactions that occurred in the 1800's under the Nonintercourse Act of 1790 except for $4 million. That would be an alternative open to the Congress at that time. It would not be foreclosed, as far as we understand, by an action of the court.

That would seem to me to be a risk that I would consider if I were the plaintiff's attorney. By making the proposal which we have offered today, we would be assuring the plaintiffs that that risk would not have to be run.

Senator METZENBAUM. Have you spoken with any Member of Congress who would accept that kind of position—that would ratify a treatment retroactively to 1799, or something like that?

Mr. CUTLER. I have personally not asked any Member of Congress, so I do not presume to speak for any Member of Congress—now or then. And it may be 10 or 12 years from now when that situation obtains.

Senator METZENBAUM. Wouldn't that be highly inequitable and very unfair?

Mr. CUTLER. If you are asking me if I were a Member of Congress would I vote for that. I probably would not, but I don't consider myself necessarily representing the views of all Members of Congress now, and I don't think I would then.

Senator METZENBAUM. The thing that bothers me about the Government's position isn't your proposal to settle for $4 million and have the State come in with some portion—although I'm not quite certain I understand that rationale, but I am not willing to make it a major point.

I think it is entirely appropriate for paragraphs a and b—although I'm not certain about "c," because I'm not sure how you prove an actionable violation of the Nonintercourse Act. How do you do that?

Mr. CUTLER. I am not sure we know.

I think that the judgment of the court in the case which has already been brought in Mashpee will, in order for the Indians to recover, have to decide that there has been an actionable violation of the Nonintercourse Act.

Senator METZENBAUM. You have already said that you have to prevail in the litigation. Now you have made some additional conditions.

Mr. CUTLER. I see your question; I misunderstood it.

When we said "prevail in the Mashpee litigation," we meant insofar as a, b, and c are concerned. We are not saying that that is a separate requirement from what we state in a, b, and c.

You can, if you will, read that as follows:

"If the plaintiffs prove a, b, and c."

Senator METZENBAUM. Couldn't you get the same proof without requiring the full litigation to go to its ultimate conclusion? Couldn't it be proven to you?

Mr. CUTLER. I am not sure how.

I suppose it could be done by creating a special arbitration commission for this particular case and making the findings of that commission not reviewable by any court.

I am not sure whether that would be permissible under the Constitution, and I am not enough of a lawyer to say.

As I said this morning, we don't have any confidence—the administration does not—that, on the one hand, either the claims are frivolous or, on the other hand, that they are not.

Let me also say, in anticipatory response to the question you raised, I would prefer not to discuss why we can't decide; because the case is currently being litigated, and I wouldn't want to prejudice the record in that case by anything I would say.

But I can say that we don't know.

As far as alternatives are concerned, for proving or not proving the claim, I suppose some kind of arbitration could be considered. I think it would have to be designed particularly to deal with this case.

Senator METZENBAUM. I think that that would be a major step in the right direction.

For the Mashpee litigation to be concluded, there is unquestionably a period of a number of years.

I think, by the arbitration process which could certainly be expedited from the standpoint of time, that the plaintiffs could be required to prove a and to prove b.

I think you would have to restate c in reverse—not that they lost their properties as a consequence of actionable violations of the Nonintercourse Act but that said properties were not a subject of transfers in accordance with the provisions of the Nonintercourse Act.

I don't know how you prove actionable violations of the Nonintercourse Act. I don't know what that means and you yourself said you don't know what that means.

Mr. CUTLER. The reason I don't know what it means is that I am not sure that we have a recent, or any—and counsel from the committee can probably state this better than I—decision of the court which would give us a clue as to that.

Mr. PARKER. The decision recently rendered by the district court in New York on the test case—I would regard as a recent decision. It definitely says that the plaintiffs prove that there is a violation of the Nonintercourse Act.

Mr. CUTLER. If that is the case, I would look to that case for some clue as to what we mean here.

But I think when we say "show an actionable violation," it means in this case to prove the areas of the claim. The wording here is not something to which we are wedded.

Senator METZENBAUM. Mr. Chairman, I would like to suggest that you explore with the tribal representatives—because I'm going to have to excuse myself—the whole possibility of resolving this matter along

the lines Mr. Cutler has indicated. The Government was amenable to changing the figure of the contribution in Massachusetts.

He now indicates that maybe they would be willing to consider arbitration; and that the issues to be arbitrated would be those contained in a, b, and c, but that there is some leeway in changing that language.

It would seem to me that that might be some progressive movement toward getting this matter resolved.

Chairman ABOUREZK. Before you leave, let's get Tom Tureen up here.

We will just interrupt Mr. Cutler's testimony for a minute.

Mr. CUTLER. Do you want me to remain?

Chairman ABOUREZK. Please do, because I have some more questions.

STATEMENT OF TOM TUREEN, COUNSEL FOR THE MASHPEE INDIANS, ACCOMPANIED BY RUSSELL M. PETERS, PRESIDENT, MASHPEE INDIAN TRIBAL COUNCIL

Mr. TUREEN. Mr. Chairman?

Chairman ABOUREZK. Senator Metzenbaum, would you like to pose that to him?

Senator METZENBAUM. Yes.

Chairman ABOUREZK. Would you introduce your colleague, first, Tom?

Mr. TUREEN. Yes. This is Russell Peters who is president of the Mashpee Indian Tribal Council.

Senator METZENBAUM. Without committing yourself to an agreement: Do you think that a useful purpose might be served in meeting with Mr. Cutler, and perhaps staff counsel, and perhaps representatives of Senators Kennedy and Brooke's offices, for the purpose of negotiating the possibility of having this matter resolved by the arbitration process with the tribe being responsible for proving only certain things that have been set out by Mr. Cutler and with the understanding that the State of Massachusetts would be expected to contribute in that?

I am not asking you to commit yourself as to whether you would be agreeable, but I am asking whether you feel there would be a useful purpose served in entering into such negotiations.

Mr. TUREEN. Senator, my clients have been willing from the outset to consider a negotiated settlement.

They said at the very beginning that they were not seeking any relief against homeowners.

In response to a request from the two senators from Massachusetts, among others, they later amended the complaint to make that entirely clear.

We were negotiating this claim at one point. That was prior to the entrance of Judge Gunter. The town and the Indians were in the process of negotiations which I thought were progressing nicely.

When Judge Gunter came into the case, it was our understanding that he was going to serve as a negotiator. Judge Gunter, however, did not believe he was a negotiator and did not attempt to negotiate.

After Judge Gunter came into the case, all negotiations stopped. We then, as you know, came ultimately to the position on which Judge Gunter made no recommendations whatsoever concerning the case.

We are entirely ready to enter into negotiations. We were willing to negotiate with the administration or the Congress. The problem has been the absence of anyone to talk to.

I share your views that the recommendation and the suggestion that Mr. Cutler has made that we litigate the entire claim and then receive only $4 million is strange.

I should add that he is not only talking about our litigating the current claim; but as I read it, he is talking about our litigating an additional claim to establish the title as recognized title.

In our current action, *Mashpee Tribe* v. *New Seabury*, the question of whether or not the title is recognized is irrelevant.

To win under the Nonintercourse Act, you need not establish that the tribe has recognized title.

Senator METZENBAUM. When you are talking about title or no title: What is the distinction being made to recognize title? Title as a matter of record? Is that what we talking about?

Mr. TUREEN. There are two kinds of title. Indians can have aboriginal title which requires no specific recognition, which is title that they acquired through exclusive use and occupancy for what the courts define as a long time. That kind of interest is protected by the Nonintercourse Act. A tribe can maintain an action under the Nonintercourse Act on recognized title alone and recover.

In addition to that, tribes can also have an interest known as recognized title in which the Government, in one form or another, has specifically recognized that the tribe has a permanent right for occupying a particular land.

The question of whether or not one has recognized title in the past has only been relevant in the context of a taking by the Federal Government.

When Congress takes what is known as recognized title, the Indians are clearly said to have a compensable interest under the fifth amendment for that taking and are entitled to just compensation for the taking.

The courts in the past have been unclear as to whether a taking of aboriginal title is compensatory.

Professor Archibald Cox, who is my cocounsel in the case in Maine, has taken a position in a memo to Judge Gunter that both aboriginal and recognized titles are constitutionally protected.

Senator METZENBAUM. Excuse my ignorance, but I don't know these terms. What is aboriginal title?

Mr. TUREEN. That is an interest that Indians have in the property. It is the right of use and occupancy which they acquired by virtue of exclusive use and occupancy for what the courts define as a long time. It is a property interest unique in our system of law. It is protected under the Nonintercourse Act.

Senator METZENBAUM. Mr. Cutler, you wouldn't challenge their right to claim title by reason of aboriginal title if they had been in being for a couple of hundred years would you?

Mr. CUTLER. I wouldn't challenge anybody's right to claim anything, Senator.

I do not know enough, either about the particular facts in this case or about the law that would particularly apply.

I would be happy to answer any questions that you may want provided for the record.

Senator METZENBAUM. I gather that the two lawyers are rather wary at this point, as I would be if I were in their position, but I also believe that both of them have some inclinations to settle this matter.

I know it would serve a useful public purpose if it were settleable.

Under your direction, I would like to see whether or not staff counsel, representing the two senators involved, and perhaps yourself if you have the time could cause to come into being in the immediate future some meeetings and discussions to see if we can't get this matter resolved amicably. I think that would be far better than Congress attempting to work its way through the matter.

I think that would be a tremendous step forward.

Chairman ABOUREZK. I agree. That is the approach I have recommended all along.

Once an agreement has been reached between the Government and the tribes in this matter, Congress would ratify that solution legislatively.

I have talked with Mr. Tureen before, and he has been amenable to that sort of approach.

As Mr. Tureen said, we can find no one else to talk with.

Senator METZENBAUM. Mr. Tureen, you would have no objection to going to arbitration to prove certain elementary facts, such as that your tribe is required by provision of the Indian Nonintercourse Act to have title to the properties claimed—you certainly have an obligation to indicate your title going back—and agree that there has been no action under the Nonintercourse Act which would preclude the assertion of your claims? Had there been such action under the Nonintercourse Act you obviously would not be able to be in court at all.

As I see it, you would be subject to a demurrer in the first instance.

Mr. TUREEN. On the other side of the *Mashpee* case, we have a veritable army of lawyers, including Jim St. Clair who did some work in this city at one time.

I won't say he is lead counsel, but he is one of the most prominent counsel.

We have survived a motion to dismiss in that case, and we are now at trial.

The tribe has made a specific settlement offer; in fact, they have made several.

The basic provison of the settlement proposal that they have made is that much of the vacant land be made into a Federal game reserve of some type.

To answer your question directly, we are willing to undertake any kind of discussions leading toward an amicable out-of-court settlement of this case and would be willing to consider any conditions at all.

I would have to confer with the tribe about any particulars.

Senator METZENBAUM. I understand.

Mr. CUTLER. May I respond to this discussion?

Without seeking to dampen the apparent progress that is being made, there are a number of questions which I don't think we should

ignore with respect to proceeding in any direction to resolve the issues.

The United States currently is not a party to this case. I think that is an important point.

Second, there are parties to this case who are not here represented right now who would have to be consulted.

Third, I am not sure under those circumstances how discussions should proceed, and I would want to consult with attorneys for the Government.

I am not an attorney for the Government, although I happen to be a lawyer. I do not presume to take a position.

We have said, and we do mean, that we are willing to consider the appropriate role for the Government in resolving those matters.

Senator METZENBAUM. Let me ask one further question.

Since you mentioned that there are counsels for defendants in that case who are probably in the room, is there some reason to believe that counsel for the defendants would have any objection to this procedure?

As I see it, it would relieve their clients of total liability. If there is objection, I would like to know about it.

Mr. TUREEN. That is a question that should be directed to them.

Chairman ABOUREZK. Are there counsel here? Would you come forward please?

STATEMENT OF STEPHEN H. OLESKEY, COUNSEL FOR THE TOWN OF MASHPEE; ACCOMPANIED BY GEORGE BENWAY, SELECTMAN, TOWN OF MASHPEE

Senator METZENBAUM. Would you answer the question I have just asked?

Mr. OLESKEY. As Mr. Tureen has suggested, this case has been since Monday on trial on what you have been referring to as issues 3 a, b, and c before a Federal judge and a jury of 12, with 4 alternates, in the U.S. district court in Boston.

So I think we have gotten a little bit off the path which I thought was being broken, which you are quite encouraged by, and that is this. Given the fact that the issue of tribal status is now going to be determined in the next 4 to 8 weeks, what can be done to give interim relief of the homeowners of Mashpee?

Arbitration might have been appropriate last fall with respect to the issue of tribal status. Was there violation of the act and was it actionable?

Those are the issues which have been laboriously framed and briefed. Openings have been made, and even as we sit here, witnesses are being examined in Boston, Mass., before the jury on this very issue.

We would like to see a resolution definitely. We are pleased the committee is considering resolution of the homeowners' difficulties.

But I think the arbitration notion—that part of the resolution—is a false trail this morning.

It is a false trail in the sense that it would be almost unthinkable to ask for a mistrial and send the jury home and have some other group not now constituted to go head and make a determination for which this jury has been carefully screened and selected.

Chairman ABOUREZK. You are saying that because a trial is in progress there shouldn't be any settlement?

Mr. OLESKEY. Not at all. I want to make that very clear, Senator.

Chairman ABOUREZK. Well that is all we are proposing.

Mr. OLESKEY. The proposal that I understood Senator Metzenbaum to be making for arbitration went not simply to negotiations between the parties, which as Mr. Tureen suggests went on before Judge Gunter and could go on if there is any hopeful sign again.

What I am speaking of is arbitration of the issue of tribal status in violation of the Nonintercourse Act which is being tried.

We are perfectly willing—the selectment and the town—to discuss a resolution of the claims against the landowners outside that context of tribal status. Indeed, that is why we though we had been invited here this morning.

Senator METZENBAUM. Why would it be a concern to you if the Federal Government decides to make a settlement with the Indian tribe and work out an amicable resolution on the matter?

How has the town—or anybody—been hurt?

I am assuming that somehow we bring in all of the land beyond the 1-acre sites as well.

Mr. OLESKEY. If it were an expeditious procedure for the Federal Government stepping into the shoes of the individual defendants in the whole matter, I think that would be greatly welcome.

I am not sure it is.

You should be aware that the individual defendants—the town and the others—moved last spring to join the Federal Government and the State as third-party defendants in the action, basically asserting much of what you have said this morning—that the real responsibility lies with the Federal Government and secondarily with the State.

Both entities asserted sovereign immunity and refused to come in. The judge upheld that claim.

Chairman ABOUREZK. It seems to me that you are talking somewhat off the point. What we are talking about is getting the parties together with the help of this committee and representatives of the Congress to try to bring about a settlement to avoid a trial.

I don't know of any trial that has ever been conducted where a settlement negotiation has been prevented because the trial was in progress. I think that is the purpose. In fact, when I practiced law, the court always encouraged settlement negotiations during the trial to avoid the completion of the trial.

That is what we are proposing. If you object to it, say so; if you don't, say so.

Mr. OLESKEY. Excuse me, but I have tried to make it clear twice, and I will again, that the town does not object to any such procedures.

Chairman ABOUREZK. Good.

Mr. OLESKEY. We are perfectly willing to go forward.

What we don't want to do is wind down the trial which will resolve a key issue, which is determinative of tribal status here and may have implications elsewhere.

Chairman ABOUREZK. Nobody has asked that we wind down the trial.

Senator METZENBAUM. If the settlement is resolved, then the case will become moot.

Mr. OLESKEY. That is quite true.

Senator METZENBAUM. Therefore, I think your moving forward with the trial is probably fine in that it provides a kind of prod on the Government as well as the Indian tribe to move forward expeditiously to get the matter resolved—maybe before 4 to 6 weeks.

I think we ought to not carry it much further and see if we can't get some negotiations going.

Chairman ABOUREZK. I will instruct the staff to immediately try to set up a meeting as quickly as they can.

I understand the position of the administration is to support settlement of the legislation if the tribe ultimately prevails in court by proving, among other things, that it has recognized title in the claimed areas and such land was alienated in violation of the Nonintercourse Act.

If the tribe's attorney would settle prior to such a final determination in the courts, would you support their entitlement to whatever amount may be authorized prior to a final court determination?

Mr. CUTLER. Mr. Chairman, I stayed up until 2 o'clock this morning trying to figure out an answer to that question. I fell asleep without success.

Chairman ABOUREZK. You never got an answer?

Mr. CUTLER. I never got an answer, and so I don't have an answer this morning.

The short answer is: I don't know.

It bears a lot of discussion. It is obviously a question that arises from proposals we have made and also arises from other proposals that have been made.

I would say this: The question that would trouble us in the event that we might agree to that is that the settlement discussions would not take place with the Government participating. If, indeed, the claim were settled without the kind of proof that we have suggested is necessary for the claim to be made, there would still be, at least to some extent, the kind of invitation to frivolous actions with which we have been concerned from the beginning.

I raise that only as a question; I don't know the answer to the question which you have raised.

Chairman ABOUREZK. I wonder if I might just put aside that question of frivolous action. Obviously, if an action is frivolous, the Government is not going to entertain any kind of settlement and is going to defend itself to the fullest extent possible. I don't think anybody would question that.

What I personally reject as an argument is that the possibility of frivolous lawsuits would prevent settlement negotiations. I don't think we need to talk about it much anymore.

You have indicated that you would be willing to support settlement legislation in the Maine situation, because some significant legal decisions have been made in that case.

I wonder if you might describe to the committee the difference in status between the Massachusetts case and the Maine case?

Mr. CUTLER. The most important difference is that the Penobscott and Passmaquoddy have made a threshold showing of their existence as tribes—their tribal status.

Second—and it is important to point this out—the Federal Government is a party in that case. We are not in the Mashpee case.

We are, in fact, representing the Passmaquoddy and Penobscott in Maine as their trustees.

The third point is that the proposal which has been made by Judge Gunter to the President is not—and I would emphasize this—a proposal that the President himself has made to the Congress. In other words, it is still something which is under consideration.

Another point is that we are not on the eve of trial in the Maine case. That, I think, is a double-edged sword; it cuts both ways with respect to the question that you have just raised.

In addition, in the Maine case, it appears from what Judge Gunter had heard from the parties involved in his discussions—and let me underline that he was not, and was not suggested by the administration to be, a negotiator in either case—there appeared to be a realistic possibility of a settlement being agreed to.

Finally, I think the case in Maine is somewhat different from the case in Mashpee as I understand the claims—and, again, I am not as comfortably familiar as I would like to be. But the case in Maine is based on aboriginal title.

Congress is arguably freer to act without fifth amendment risks in the case of aboriginal title than it is in a case of recognized title.

So I think that there are several differences between the Maine and Mashpee case. Some of them perhaps go to the merits, which as I said earlier I do not want to get into this morning. But I think there are substantial differences that put us in a quite different position in the one than in the other.

Chairman ABOUREZK. I have no more questions except to ask if my understanding as summarized is accurate—if you understand my understanding.

The administration does not support any proposal to transfer liability from the small homeowners to the Federal Government. Is that correct?

Mr. CUTLER. That is correct.

Chairman ABOUREZK. And you do not support the other proposal that has been floated to extinguish claims against the small homeowners for a sum of about $4 million?

Mr. CUTLER. Only under the conditions which we have proposed.

Chairman ABOUREZK. Thank you, Mr. Cutler, for your appearance. It was a pleasure to have you here today.

Mr. CUTLER. I appreciate your hearing from us.

Chairman ABOUREZK. Mr. Oleskey, do you have a formal statement which you would like to make?

Your prepared statement will be made part of the record.

[The prepared statement of Mr. Oleskey follows:]

STATEMENT OF STEPHEN H. OLESKEY BEFORE THE SENANT SELECT COMMITTEE ON INDIAN AFFAIRS, WASHINGTON - OCTOBER 21, 1977.

Mr. Chairman, Committee Members: My name is Stephen H. Oleskey and I am a partner at the law firm of Hale and Dorr in Boston, Massachusetts. I am one of the counsel to the Town of Mashpee and its residents in a suit entitled, Mashpee Tribe v. New Seabury Corp., commenced in August, 1976, in the U.S. District Court in Boston, Massachusetts. This case began trial on Monday, October 17, 1977, before a jury of twelve. I appear today on behalf of the Selectmen and residents of the Town of Mashpee to offer their views on S.J. Res. 86, (hereinafter "the Resolution") filed by Senator Kennedy for himself and Senator Brooke on October 4, 1977.

The dominant and most immediate problem in the Town of Mashpee is clearly identifiable: the economic chaos resulting from the cloud on titles created by the plaintiff's claim. Real property transactions in Mashpee are at a standstill. Mortgages cannot be obtained and property, therefore, cannot be sold for an amount even remotely approximating its fair market value prior to the institution of the law suit. In many instances, property owners have responded to the decrease in marketability in their titles and interests by refusing to pay their real property ad valorem taxes; or, in the alternative, by seeking abatements in their tax dur. The last tax collection, based upon appraisals of the actual value of land in Mashpee as of January 1, 1976, (a date prior to the commencement of this action) but billed and collected after suit was filed, was down 40%. It is anticipated that the next collection, which will be as of

January 1, 1977, (a date after the commencement of this suit) will result in an additional, more drastic reduction in tax revenues. Indeed, six hundred forty thousand dollars of levied taxes are in arrears in a total Town budget of two million dollars. The Town of Mashpee is rapidly approaching a financial crisis of disastrous proportions.

Individual homeowners and land owners have likewise suffered from the pendency of the plaintiff's claim. Real property foreclosures and bankruptcies have increased substantially. Moreover, the inability to transfer lands has resulted in significant unemployment in the Town's land development related enterprises. The largest developer in Mashpee is on the brink of insolvency. Other developers have been similarly affected. Real estate brokers, contractors and construction workers are without work. Further, this building - trade related unemployment has had a "ripple" effect; that is, the decrease in income of those dependent on land development for their livelihood has had a negative impact on other businesses. Restaurants, retail stores and gas stations have gone out of business. Tourism is down and prospects for the coming seasons are bleak.

The pendency of this suit has further jeopardized the viability of the Town by precluding the continued growth of its real property tax base. Mashpee has a history of precarious

financial conditions. Indeed, from 1932 to 1969, the Commonwealth of Massachusetts, through a state-created quasi-receivership, the "Mashpee Advisory Commission", assumed responsibility for the conduct of the financial affairs of the Town. Although the Town thereafter established itself to be financially sound, it could not have done so without the continued growth of its tax base. Indeed, the importance of the continued growth of the tax base to the financial stability of the Town was recently identified in a study of the Town by the Massachusetts Department of Community Affairs. Massachusetts Department of Community Affairs, Office of Local Assistance, Developing a Land-Use Management Process: A Case Study of Mashpee, Massachusetts 19 (Publication No. 4, December 1975) (emphasis added). Without the continued, controlled growth of the real property tax base, Mashpee not only will be unable to undertake necessary capital improvements, but also will find itself unable to supply even those rudimentary services it now provides.

In the view of my clients, it is most appropriate that this Resolution should be passed by the Congress for the ultimate moral responsibility for any claim asserted by the plaintiff in Mashpee must rest with the United States Government. Since 1790, hundreds of land transactions have taken place within the boundaries of the small Town, including substantial takings by the United States of privately owned land for what is now Otis Air Force Base. At no time was there any indication by the United States that it regarded the plaintiff as an Indian "tribe"

whose transactions were affected in any measure by the Non-intercourse Act. 25 U.S.C. §177. In fact, on at least two occasions in this century, the United States Government, through the Bureau of Indian Affairs, expressly declined to provide financial assistance to individuals of asserted Indian ancestry in Mashpee on the grounds that no "tribe" of Indians resided there. The present non-Indian residents of the Town of Mashpee, who number in the hundreds, purchased their land against this unbroken record of 186 years of history of the United States' total non-involvement in the affairs of any group of persons referred to as a "Mashpee Tribe" or a "Mashpee Wampanoag Tribe". It is, therefore, only fitting that the United States act now in the face of the jeopardy which confronts the many innocent residents of the Town of Mashpee who are not of Indian descent.

For all of the above-stated reasons, the Town wholeheartedly supports any Legislation, including the Resolution now under consideration, which helps to relieve the economic burden on the Town of Mashpee and its residents. There are, however, certain comments I would like to offer concerning the precise language used in the Resolution.

The Resolution as presently drafted deals only with any right, title or interest to the land described in Section 2 (hereinafter "the land") asserted in the pending action. The Resolution does not extinguish any trespass or damage claims of the plaintiff; does not preclude institution of a further action by the United States on behalf of the plaintiff; and does not bar the plaintiff from asserting any other title to

or interest in the lands. It is my understanding that the plaintiff fully supports extinguishment of all of the plaintiff's Nonintercourse Act claims against the individual homeowners in Mashpee. In order to effect such a complete extinguishment, and to provide the homeowner in Mashpee with a clear and marketable title, I would suggest the following modification of lines 3 through 9 of the Resolution:

> That any and all claims of the plaintiff to the land described in Section 2 below and any and all claims of the plaintiff for trespass or damage to said land, including but without limitation, all claims asserted by the plaintiff in an action captioned "Mashpee Tribe v. New Seabury Corp., et al", filed in the U.S. District Court for the District of Massachusetts (Civil Action No. 76-3190-S), are hereby extinguished.

I have been informed that one of the primary concerns with this Resolution is the suggestion that it creates a significant new liability on the part of the United States. Specifically, some persons have expressed concern that this legislation will provide to the plaintiff an immediately actionable right against the United States for the full fair market value of the land. These persons apparently believe that this Resolution will <u>create</u> a new liability on the part of the United States. For several reasons, I do not believe this to be true. First, I cannot believe that the United States will allow the individual homeowner to be dispossessed even if the plaintiff prevails against those persons at trial. Hence, if the plaintiff proves a valid claim to all of the land in the Town of Mashpee, the United States should assume the financial responsibility for the claims against the homeowner. All this Resolution does is acknowledge that

responsibility now as a contingent liability.

Second, the plaintiff bases its claims on two kinds of asserted title: aboriginal title and grant title. To the extent that the plaintiff's claim to the land is one of aboriginal title, extinguishment can clearly be made without compensation. Tee Hit Ton Indians v. United States, 348 U.S. 272 (1955). Extinguishment of any such aboriginal title claim therefore can be effected without exposing the United States to any liability at all.

Finally, even if the United States is liable for extinguishment of a valid claim, it is not clear that the proper measure of damages would be equal to the fair market value of the land. Indeed, if plaintiff's compensation for the loss of the lands is calculated from the time of the claimed alienation (plus interest), the liability of the United States would be limited to the fair market value on the date of alienation plus interest. This amount would, of course, be substantially less than present value of the land.

I thank you for the opportunity to speak on behalf of the Town of Mashpee, its Selectmen, and its citizens. I would be happy to answer any questions you might have.

Mr. OLESKEY. Thank you, Senator.

We appreciate the invitation to appear.

As I indicated, there is a trial going on. Mr. St. Clair sends his apologies, but he is chief trial counsel and needs to be there this morning.

Mr. Tureen and I have similarly been involved as associate trial counsel in Boston and will continue to be so.

Chairman ABOUREZK. Who is trying the case on the other side if Mr. Tureen is here?

Mr. OLESKEY. Mr. Lawrence Shuboff, who is a Boston attorney, together with a colleague of Mr. Tureen's.

Several background comments, I hope, are in order, although much of what I had planned to say has been filled in by other witnesses.

As the committee may know, unlike many of the cases which are found in the lawbooks, particularly out of the Western portion of this country, this is not a case that involves a treaty between any group of Indians called tribes and the U.S. Government, nor is there any Federal recognition at issue here.

Since the question of recognition for tribal status is at the heart of what is going on in Boston, and since Mr. Tureen and I are counsel in the case and are under order of Judge Skinner there not to discuss anything which would reflect on the fair and orderly process of the trial, I feel somewhat constrained, as I am sure he does, in making comments which would be appropriate perhaps were that order not outstanding.

Chairman ABOUREZK. I think you can restrict your comments to just the proposals about transferring liability and for how much.

Mr. OLESKEY. Let me first make one comment about the notion of an overall negotiated settlement since that was the subject last discussed.

There have been discussions, as Mr. Tureen properly suggested, between the parties up to the time that Judge Gunter was appointed, about the possibility of an overall settlement.

In each instance, a fundamental impediment was the position of the plaintiff in the litigation that substantially all of the undeveloped lands in town would have to be given to the plaintiff.

My own understanding of Mr. Tureen's position, again this morning, was that was indeed still the position of the plaintiff.

I think Senator Brooke and Senator Kennedy accurately reflected the discouragement of the town with that perspective when they said that the reason they were sponsoring Senate Joint Resolution 86 with its House counterpart, proposed by Congressman Studds, was to try to get a piecemeal solution to an overall picture which had so far proved impossible of settlement on its terms.

So although I encourage your notion that we continue discussions, and the town is perfectly willing to do that, I think you and the committee have to understand the context of settlement which has gone on thus far.

Mr. Benway will discuss—as Senator Brooke did—the importance of real estate and further development of the tax base and survival of the town.

Essentially it has been the town's position, thus far, that no settlement which requires taking substantially all undeveloped land in town for any purpose is an acceptable one.

Chairman ABOUREZK. May I ask why?

Mr. OLESKEY. Mr. Benway will talk to that. It is a governmental issue rather than a legal one.

Mr. BENWAY. It is the position of the town that if the substantially greatest amount of undeveloped land were removed, the town—which is only 25 percent developed at this point in time approximately—we are not a very developed town at all. Our population runs about 4,000. We have about 3,000 dwellings on about 1,000 acres. We are talking about 16,000 acres here.

It is our contention that if all the remaining acreage, or a substantial amount, is put aside, the town, in essence, with no growth would become stagnant and die.

The tax base also is one which is static.

Chairman ABOUREZK. So are you then taking the position that you would be opposed to a transfer of liability for the small landowners to the Government and let the Government accept the liability just for small landowners?

Mr. BENWAY. No; I'm not, Senator.

In that regard, it has always been the belief of everyone in the town of Mashpee that the responsibility here is the Federal Government's responsibility and not the responsibility of the small private owner in the town of Mashpee.

Chairman ABOUREZK. Then you are saying that the town of Mashpee would support legislation such as proposed by Senators Kennedy and Brooke?

Mr. BENWAY. Yes, but with a couple of additions or notations which I think the committee probably would want to know about.

If the developed property, as has been discussed here, with those dwellings upon them is the only amount that is exempted—and we are talking about 3,000 dwellings and 1,000 acres and 16,000 acres in question—that does not return to the town of Mashpee the town's economic viability or stability, and it doesn't return to those property owners who are now technically removed from the suit. It does not return to them the value of their property as of just prior to the commencement of this suit.

Therefore, if someone had technically a clear title because of the action here of this committee of the Congress and had to sell, they would probably sell at something around 70 to 75 percent below market value. They would be substantially hurt.

The people who would be involved in this would probably be elderly; the people who have to move because they have been prescribed to live elsewhere. These are people who cannot substantially suffer such a loss.

So I would say also, as Senator Brooke correctly pointed out, the town of Mashpee's economy is the plumber, the electrician, the real estate, and the builder.

I am not suggesting in any way, shape, or manner that development procedure continue. What I would suggest is that if the developed lots—the lots buildable right now if everything else was frozen—it

would return the economic stability and the backbone back to the community and put these individuals back into a capacity where they can go back to work and pay their taxes.

The town of Mashpee right now is short—just a little over a half million dollars—on its last return of tax money. The entire budget is $3 million.

We are going up to borrow the end of this week a short-term note for $300,000. This is going to be compounded. It is also compounded for the individual private property owner in his taxes in that the legal fee which has been referred to today is amounting to a significant sum of money that is going to increase.

However, it is the feeling on the part of the community that we do want to find out, as has been suggested, since we are this far in the trial. Let's have this issue of tribal identity resolved in Federal court.

Chairman ABOUREZK. In other words, you are not just interested in taking small property owners off the hook?

Mr. BENWAY. Yes; I am.

Chairman ABOUREZK. What amendment would you offer for the legislation?

Mr. BENWAY. I would only suggest that by a limited removing of the homeowner and not the lot next door or downstream we are not, in fact, completely removing that homeowner from any suffering or hurt.

If he has to sell, technically he will have a free title. There is no question about it. It is a marginal relief. He will have to sell at 70 or 75 percent of lower value of what that land would have been worth.

Chairman ABOUREZK. I understand that.

What amendment would you offer to this legislation?

Mr. BENWAY. I would offer an amendment that the exempted property would also include the developed lots that are buildable today.

Chairman ABOUREZK. Up to 1 acre?

Mr. BENWAY. Up to 1 acre, but actually it amounts to about 1,500 acres—or 3,000 half-acre lots—at maximum, which would amount to 2,500 acres of a 16,000-acre section.

Chairman ABOUREZK. You would leave open the claim then for large undeveloped areas?

Mr. BENWAY. Yes, sir, and that would apply to approximately 13,500 acres—or something like 75 percent.

Chairman ABOUREZK. What is the total amount of acres under claims?

Mr. BENWAY. 16,000 acres.

Chairman ABOUREZK. And under the Kennedy-Brooke legislation: How many acres would be exempted?

Mr. BENWAY. About 5 percent, or 1,000 acres.

Chairman ABOUREZK. You are recommending that you add how many acres to that?

Mr. BENWAY. Approximately 1,500 acres.

Mr. OLESKEY. Senator, I don't want to lose sight of a very valuable suggestion that I think came from the committee today, and which I heard Mr. Cutler support, I hope, for the administration and which the town welcomes.

That is a full involvement by the Federal Government in resolving this.

The burden, as you correctly suggest, shouldn't fall on the town or primarily even on the State of Massachusetts. There can be no solution, in our judgment as counsel, and I think the selectmen share this, that places the burden there.

If the Federal Government is willing to step in and let claims be made in their entirety against it in the Court of Claims or some other mechanism, and the town would welcome that and has always taken that position.

Indeed, you should be aware that the judge trying the case—Judge Skinner—asked the Bureau of Indian Affairs within the last month if it would not appeal on behalf of the U.S. Government in the trial and take the position. The Bureau wrote back that it did not have the time nor the ability to be involved at this time.

So what you suggested, in terms of increased Federal assumption of a moral and a legal responsibility—legal if the plaintiffs are right—is something the town very much welcomes.

Chairman ABOUREZK. I would appreciate it if you would remain, although I don't have any more questions right now.

Mr. Tureen, would you care to make a formal statement?

Mr. TUREEN. Thank you, Mr. Chairman.

I, too, will keep my remarks concerning the merits of the litigation very brief.

Even though I have become extremely fond of Mr. Oleskey during this litigation, I am very surprised that he would both make reference to the judge's prohibition on our making comments about the case outside of court and then slip in a comment that this is a case that involves neither recognized tribes nor tribal treaty, since it is our position that neither of those facts is relative to the litigation.

Having said that and paid my respects to my good brother next to me, I think that the discussion so far has largely brought out the position of my clients which is that they are, and have been, receptive to the idea of a negotiated settlement.

The problem that we have with the recommendation made by the Office of Management and Budget is that it requires the tribe to litigate and establish everything that it must prove in this current litigation and then embark upon still another lawsuit. And at the end of that process, receive $4 million. When if it had, indeed, won all those things, it would be entitled, in our opinion, to something far in excess of that.

We support the joint resolution that has been introduced.

Chairman ABOUREZK. Is that the first one?

Mr. TUREEN. Yes.

We support that provision because we feel that it would simply maintain the status quo.

The tribe's position with regard to the developed parts of town is that they are not seeking relief against those particular defendants and have now amended their complaint to make that abundantly clear. But at the same time, they feel that if they do have a valid claim to that part of town and the Federal Government seeks to extinguish that claim, that they should be entitled to something.

At this point, we are not demanding any payment. The suggestion that the tribes are doing that is not correct.

The tribes are willing to have that question left to the future, and that is why we support the joint resolution which was introduced by Senator Brooke and Senator Kennedy and Congressman Studds.

It is our feeling that that is precisely what that joint resolution would do.

By the same token, we are opposed to the OMB suggestion, because it would not preserve the status quo. It would put a cap on the potential recovery at this point and still subject the tribe to the risk of litigation.

We are receptive to the idea of settlement of all or a portion of the claim at this time, and the tribe stands ready to negotiate on such a suggestion.

I should say that in terms of settlement discussions to date, it is our feeling that the town was participating in good faith talks up until the time that Judge Gunter entered the negotiations.

I should add, however, that at no time during those discussions did the town ever make an offer. The tribe has made several offers, and there has never been a counteroffer by the town.

Mr. Olesky testified that the town is not receptive to a proposal which would involve taking the bulk of the undeveloped land and putting it into some kind of park status, but at the same time it has never suggested how much less than that would be acceptable to the town. We have had no offers from the town.

Chairman ABOUREZK. What do you think of the proposal, just made by Mr. Benway, that you include the other undeveloped lands in the town, amounting to about 1,500 acres, in the land to be exempt?

Mr. TUREEN. I am sure my clients are ready to consider that suggestion very carefully, and that is the closest thing we have ever had to a counteroffer from the town.

I understand it would be a partial solution, but we certainly would be willing to consider that seriously.

Chairman ABOUREZK. If we are going to move this legislation in a satisfactory and reasonable way for everybody, we would need to know in a very short time whether that might be acceptable to your clients.

Mr. TUREEN. The president of the tribal council is here and would probably be a better one to ask.

Mr. PETERS. As I sit here listening to all of these things which are happening today, I feel fortunate that I am sitting here at the same table with Mr. Benway for the first time in many months.

We support, I hope, the passage of some kind of legislation that will provide relief to the homeowners of Mashpee. I think that is what we are here about.

I am getting confused with how we should arrive at some kind of legislative language or some sort of a solution that would provide that relief to the homeowners.

With regard to the suggestion made by Mr. Benway that we entertain some sort of a discussion regarding the undeveloped land in Mashpee: Yes, we would certainly be willing to discuss this, as Mr. Tureen said, very carefully.

One of our objectives is—although we don't want to completely stop development in the town of Mashpee—we feel that the tribe is very

much concerned about the development that has taken place in the past few years.

For example, 12 years ago Mashpee had a population of roughly 655 year-round residents. Today we have a population in excess of 5,000 people. That rate of growth, if it were to continue as Mr. Benway suggests, would severely affect not only the Indian people in the town of Mashpee but the town itself.

So we want to be very careful about how we negotiate the continued growth of the town of Mashpee.

I understand there are some economic hardships. Mashpee is a very unique place in many ways—primarily because it has no economy. It has very little commercial activity and very little industrial activity.

It is essentially a bedroom community, and it is not supportive of itself.

Therefore, we have very unique problems there that affect not only the newcomers who have arrived in the past few years but seriously affects the Indian people who live there as well. We have problems also.

To answer your question: Yes; we would be perfectly willing to sit down and discuss with anyone any of the suggestions put forth by Mr. Benway.

Chairman ABOUREZK. The question is really when could you forward to the committee your position on the proposed amendment? How soon could that be done?

Mr. PETERS. We would have to meet with the members of the tribal council. We can do that in a very short time; say, within a week.

Chairman ABOUREZK. Can you give me a better idea? We can't operate on a weekend. If we are going to move this legislation, we are going to need to know your position so the committee can then consider your position on it, as well as the town's position.

Mr. PETERS. Could I suggest a week from Monday?

Chairman ABOUREZK. Can you do it sooner?

Mr. PETERS. Yes.

Chairman ABOUREZK. How much sooner?

Could you do it by the middle of the week?

What we are talking about is that we have to then meet again after we have heard your position to consider all the aspects of it, and we would like to do that before the week is over.

Mr. PETERS. I believe Wednesday could be a date we could establish.

Chairman ABOUREZK. That is what I was thinking, and I am glad you said that. [Laughter.]

Mr. TUREEN. I wonder if I can negotiate for Thursday?

Chairman ABOUREZK. How about Thursday morning?

Mr. TUREEN. Yes. We could have a meeting Wednesday night.

Mr. OLESKEY. You will note from page 5 of my prepared remarks—which is roughly what we filed last week with the House committee on behalf of the town—that there is a modification which has been suggested. I want to make sure that it is understood that this is part of what the town feels is important if any effective relief is going to be given to the small businessman and homeowner.

That is, that the legislation extinguish any and all claims of the plaintiff—not simply its possessory claim for aboriginal title. Trespassing and damages to this 5 percent of the land have to go out in this legislation or the homeowner is not going to have any relief in terms of what banks or title companies or anybody else will do.

Chairman ABOUREZK. I understand that.

I think that is contemplated in the legislation for a specific sum of money: Isn't that correct?

Mr. OLESKEY. I think Mr Tureen was talking about Senate Joint Resolution 86, which is what I was directing my remarks to, when we both talked about the legislation before you.

Mr. TUREEN. I would agree that if a settlement bill or legislation is to be enacted, whether it pertains to part or all of the town, in fairness it would have to include both possessory and trespass claims. We would understand that and agree to that.

Chairman ABOUREZK. I would think so.

At some point I guess we are going to have to put in an exact definition.

So let me just give you a rough definition of what you are including as your proposed amendment.

Undeveloped land within the township of Mashpee of up to 1 acre in size. Is that what you have in mind?

Mr. BENWAY. What I had in mind as far as the lots were concerned is this. I would consider buildable lots as developed property. Most of it is already in developed areas where many houses exist today.

In the usual case I would consider it where, going down the street, you have two houses and an empty lot and then another house and an empty lot and two more houses. That is the kind of property and those are the kinds of lots I am talking about.

What still would be excluded by my definition would be acreage in excess of 1 acre which is not buildable into sublots or subdivided as such.

Chairman ABOUREZK. Let me try to understand that.

If there is a 20-acre tract that is buildable, are you thinking of exempting that?

Mr. BENWAY. No; I am not.

Chairman ABOUREZK. But a 1-acre tract that is buildable, you are exempting?

Mr. BENWAY. Yes; I would.

Chairman ABOUREZK. And that is within the township of Mashpee?

Mr. BENWAY. That is correct.

Chairman ABOUREZK. Within the town.

Mr. BENWAY. And businesses.

Chairman ABOUREZK. What specific boundary are you talking about?

Mr. BENWAY. The boundary really is the whole town of Mashpee.

Chairman ABOUREZK. Is it done in townships?

Mr. BENWAY. It is a township—one township.

Chairman ABOUREZK. So we were talking within the boundary of Mashpee as defined on maps and plats right now?

Mr. BENWAY. Correct.

Chairman ABOUREZK. We are saying that empty lots within that town of up to 1 acre in size would be exempt?

Mr. BENWAY. Correct.

Chairman ABOUREZK. Does everybody understand that?

Mr. OLESKEY. Plus existing homes.

Chairman ABOUREZK. That is already in the legislation.

Mr. PETERS. May I make a comment on that?

The previous proposals that we have thrown out—we have talked about what we consider to be substantially developed areas. I be-

lieve that is what George Benway is talking about—house lots that are in substantially developed areas. I believe we could find some common ground there. But in developments that have been claimed and laid out which are not substantially developed, I hope George isn't talking about all of those.

Chairman ABOUREZK. I think we ought to make it clear. If you don't make it clear at the hearing today—I would suspect that both sides could sit down at a map and figure it out before you decide.

Mr. BENWAY. That is what I would suggest; but what I am talking about, as you suggested, Senator, is any buildable lot presently in the town of Mashpee of 1 acre or less.

Mr. TUREEN. It sounds to me, Senator, as though there are details that will have to be discussed outside of the committee hearing.

Chairman ABOUREZK. I think you are going to have to have a map in front of you.

Then could we by Thursday morning, both sides, perhaps sit down and go over a map and let us know exactly what it is so that we can create a legislative definition for it.

Mr. OLESKEY. From my perspective, obviously it is key, and I think Mr. Tureen shares my view or at least understands it—I am sure he doesn't share it—that any draft legislation, and I have seen several versions this morning that go beyond Senate Joint Resolution 86, not imply or explicitly involve recognition of the plaintiff as a tribe which is the very issue at the heart of the trial now going on.

Chairman ABOUREZK. That is right.

Let me close by saying this.

If you would get together on draft language and describe the area to be exempted and get that to the committee as something you can both agree on, would that be satisfactory to you?

Mr. TUREEN. We would be glad to respond.

It occurs to me that there was another gentleman sitting here with us before, who has now left and may or may not be present in the room, who said that he had absolutely no interest in any kind of settlement like this.

Chairman ABOUREZK. Unfortunately, he is not a Member of Congress and can't vote.

Mr. TUREEN. I believe he is employed by a man who can exercise something known as a veto.

Chairman ABOUREZK. What we are going to do is pass what we believe is right and let them pay their dues and take their chances.

Mr. TUREEN. Fine.

Chairman ABOUREZK. There is no other way we can operate.

Is there anything further you might want to say?

Mr. BENWAY. On behalf of the town of Mashpee, we thank you very much for this opportunity to get before you what is happening in the town of Mashpee.

Chairman ABOUREZK. We would like to thank all of you.

Mr. TUREEN. Senator, we appreciate the invitation and the interest of this committee.

Chairman ABOUREZK. The hearing is adjourned.

[Whereupon, at 12:35 p.m., the hearing was adjourned.]

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